Supreme Court, U.S.
FILED

No. 97 1644 DEC 8 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October 1997

Barbara Mutsuko HASHIMOTO, *Petitioner,*

v.

John DALTON, Secretary of the Navy, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Barbara Mutsuko Hashimoto
Pro Se
1538 Ala Amoamo Street
Honolulu, Hawaii
(808) 839-1507

46 pp

QUESTION PRESENTED FOR REVIEW

1) May the Ninth Circuit Court deny the plaintiff, Barbara Hashimoto due process of law as guaranteed by the Civil Rights Act of 1964, 42 U.S.C. §1981, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-2000e17, by presuming that the district court judge performed his duties of judicial office impartially and diligently and examined all the facts of record before arriving at its "Findings of Facts and Conclusions of Law"?

2) Did the District Court err in applying Federal laws, statues and regulations?

3) Did the Ninth Circuit Court err in affirming the District Court's dismissal of the reduction in force (RIF) and reprisal (Case 1) action and in upholding the defendant's charge of insubordination for not signing purchase order(s) worth $140,000?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 3

Reasons for Granting the Writ 4

The District Court erred in its finding of facts . The Ninth Circuit presumed that the District Court examined the evidence and upheld the District Courts judgments based on this assumption when in fact:

A. The District Court's Findings Were Not Based on the Evidence and Court Records 6
B. The District Court Ignored Federal Laws, Statues and Regulations 22
C. The Appeals Court Erred in Affirming the District Court's Dismissal of the RIF Action and Reprisal (Case 1) and in Upholding the Defendant's Charge of Insubordination for Not Releasing $140,100 in Purchase Orders 24
D. The Appeals Court Held that Barbara Hashimoto has Successfully Demonstrated the Elements in a Retaliation Claim 28

TABLE OF CITATIONS

Page

Cases Cited:

Eastland v. Tennessee Valley Auth., 704 F.2d 613, ...29

Folkerson v. Circus Enterprise, Inc.,
107 F.3d 754, 755 (9th Circuit 1997). 28

Gandola v. Federal Trade Commission,
773 F.2d 308, 312 (Fed. Circuit 1997). 26

Gifford v. Atchison, Topeka and Santa Fe Ry. Co.,
685 F.2d 1149, 1156-1157 (9th . Circuit 1997) 29

Gonzalalez v. Bolger., 486 F. Supp 595, 601
(D.D.C. 1980) 29

Griffen v. City of Omaha, 785 F.2d 620
(8th . Circuit 1986).

Hashimoto v. Dalton., 118 F.3d 671, 680
(9th . Circuit 1997) 4, 28

Hays v. Postmaster General, 868 F.2d 328 (1989) 25

Liguori v. United States Military Academy,
4 M.S.P.B. 100, 101, 4 M.S.P.B. 6, 7 (1980) 26

Mead, 87 F. 2d at 286

Romain v. Shear, 799 F.2d 1416, 1421
(9th . Circuit 1986) 25

Silver v. KCA, Inc., 586 F.2d 138, 141
(9th . Circuit 1978) 29

Vinieratos v United States, Dept. of Air Force,
939 F.2d 762, 766 (9th. Circuit 1991) 29

Washington v. Garrett, 10 F3d 1421
(9th . Circuit 1993) 25-26

Statues Cited:

28 U.S.C. §1254 (1) 1

28 U.S.C. §1291 1

42 U.S.C. §2000e-2 (a) (d) 23

42 U.S.C. §2000e-3 (a) (e 704 (a)) 2

42 U.S.C. §2000e-2000e17 1

42 U.S.C. §2000e-2(d) to 42 U.S.C. §2000e-16 2

Rules Cited:

Federal Rule of Appellate Procedure 4(a) (3)

APPENDIX

Appendix W— Affidavit of Sheila Mitchell 104a

Appendix X— Decision on Administrative Grievance
dated 18 February 1985 . . . . . .108a

Appendix Y— Response to Proposed Suspension
dated 30 July 1985 . . . . . .110a

Petitioner, Barbara Mutsuko Hashimoto respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit entered in this matter on July 3, 1997.

OPINIONS BELOW

The judgments of the United States Court of Appeals for the Ninth Circuit are attached as Appendix D and E. The Memorandum Opinion and Findings of Fact and Conclusions of Law of the District Court are attached as Appendix C

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the judgment of the Appeals Court is invoked under 28 U.S.C. §1254(1). The Court of Appeals had jurisdiction pursuant to 42 U.S.C. §20003-16.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Civil Rights Act of 1964, 42 U.S.C. §1981 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e - 2000e17

42 U.S.C. §2000e-2 Unlawful Employment Practices

(a) Employer practices

It shall be unlawful employment practice for an employer—

(1) to fail or to refuse to hire or to discharge any individual, with respect to his compensation, terms, conditions, or privileges of employment because of such individuals race, color, religion, sex, or national origin: or

(2) to limit, segregate, or classify his employees or applicants for employment, in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee, because of such individual" race, color, religion, sex, or national origin.

(d) Training programs

It shall be unlawful employment practice for any employer, labor organization, or joint labor management committee controlling

apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

STATEMENT OF THE CASE

Petitioner, Barbara Hashimoto claimed discrimination based on race, national origin, and gender and unlawful retaliation. Hashimoto was a former Federal employee. The United States District Court for the District of Hawaii had jurisdiction to this case pursuant to 42 U.S.C. §20003-16. Final judgment was entered in the District Court on March 6, 1995 which disposed of all claims of all parties. The defendant, the Secretary of the Navy filed his notice of Appeal on May 4, 1995. On May 8, 1995, Hashimoto filed her notice of cross-appeal on the March 6, 1985 judgment. The plaintiff's notice of appeal was timely pursuant to Rule 4(a) (3) of the Federal rules of Appellate Procedure.

The discrimination action was initiated by the filing of a pro se complaint by the plaintiff in the United States District Court for the District of Hawaii on February 6, 1991. The substance of the claim was that while employed by the Department of the Navy at its Marine base at Camp Smith, Hawaii, Hashimoto was discriminated against on the basis of her race (Japanese) and sex (female) and retaliation for engaging in a protected activity. She claimed that as a result of her contact with her EEO counselor, she was subjected to unlawful reprisal. Her claims where divided into Case 1 and Case 2.

The Case 1 discrimination claims were: denial of overtime compensation, performance appraisal based on inappropriate elements and standards, suspensions based on false charges, denial of within grade increase because of unfair performance appraisals, denial of 5 consecutive days of annual leave prior to being suspended, and a reduction-in-force (RIF) action stemming from discrimination and reprisals.

Case 2 claims were unlawful retaliation by Hashimoto's second line supervisor at Camp Smith, which resulted in denial of employment by the Department of the Army.

January 21, 1992: Defendant filed a motion to dismiss 1)plaintiff's claims not raised in the administrative complaint, 2) claim of retaliation in Case 2 and 3) claim of unlawful reduction in force action. August 17, 1992, the trial court denied defendant's motions 1) and 2) and granted defendant's motion 3). December 1, 1992, the court denied the plaintiff's motion for reconsideration in its August 17, 1992 order.

April 2, 1993, defendant filed a motion to dismiss or in the alternative for summary judgment, seeking to dismiss the plaintiff's retaliation and other claims in Case 1. June 22,1993, the district court issued an order dismissing plaintiff's claim of retaliation in Case1 and dismissing all claims which occurred more than 30 days prior to the filing of the administrative complaint. July 8, 1993, trial court filed its o-der denying plaintiff's motion for reconsideration of its order dismissing the retaliation claim.
July 1, 1993, trial court ordered that the trial of plaintiff claims be bifurcated. July 7, 1993, jury trial of Case 1 began. July 19, 1993, the jury returned its verdict awarding the plaintiff $300,000. October 4, 1993, the trial court entered its order denying the defendant's motion for judgment as a matter of law and granting defendant's motion for a new trial.

October 13, 1993, the second trial on plaintiff's Case1 commenced. October 26, 1993, the jury returned its verdict awarding the plaintiff $280,000. November 2, 1993, the trial of Case 2 began. The trial ended with a jury verdict on special interrogatories finding unlawful retaliation but also finding that the plaintiff would not have obtained a job from the Department of the Army. May 25, 1994, the trial court vacated the jury verdicts and entered findings of facts and conclusions of law wherein the court issued findings in favor of the defendant in Case1 and ordered the plaintiff be awarded attorney's fees and cost to Case2.

March 6, 1995 judgment was entered and the defendant's notice of appeal filed on May 4, 1995. May 8, 1995, plaintiff filed notice of cross appeal.

REASON FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS SET AN IMPORTANT PRECEDENT THAT SHOULD BE SETTLED BY THIS COURT. IN *HASHIMOTO v. DALTON*, THE APPEALS COURT, BY PRESUMING THAT THE TRIAL JUDGE PERFORMED ITS JUDICIAL DUTIES DILIGENTLY AND WITHOUT PREJUDICE, GRANTED THE STATUS OF INFALLIBILITY TO THE TRIAL JUDGE SINCE HE ALSO HAS THE POWER TO OVERTURN A JURY'S VERDICT IN A CIVIL CASE.

One of the "Statements of Issues Presented for Review" to the Ninth Circuit by the plaintiff, Barbara Hashimoto, was whether the district court's findings of fact and conclusions of laws, filed on May 25, 1994 were erroneous? Rather than reviewing the evidence for itself the appeals court took the assertions of the district court and assumed that they were evidence. For example, the district court distorted the evidence to depict Hashimoto as disobedient. It stated:

> Although plaintiff contends that she already had a turnover file prepared, Plaintiff concedes that she did not provide it to Hinman.

Hashimoto could not provide the turnover file to Hinman because it had been removed from her office while she was on a 5-day suspension. The undisputed testimony is that Hinman had the contents of Hashimoto's office removed while she was on a 5-day suspension. Regarding this issue, the appeals court affirmed the trial judge: "to the contrary, the court expressly acknowledged each and every piece of contradictory evidence which Hashimoto recites...". When a judge is biased in a civil case, justice cannot be served if the appeals court assumes that the trial court had made every attempt to accurately

reflect all the evidence before making its findings. The appeals court states:

> [a] judge is not required, in making findings, to mention every item of evidence and either adopt or reject it … The appellate court presume[s] that the [trial] judge considers
> all of the evidence, and relies on so much of it as supports the finding and rejects what does not support the finding, unless the judge states otherwise. Appendix D 66a

This system works if the trial judge follows the Rules of Judicial Conduct. However, Canon 3: "A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently" was violated, and Hashimoto was denied due process of law. Subsection 5 states that a "Judge Shall Perform Judicial Duties Without Bias or Prejudice".

In this discrimination claim of race, gender and reprisal, the trial judge, a white male, was biased or incapable of comprehending the evidence and issues. By examining all the facts of the court proceedings rather than reading the judges findings (opinions), it becomes painfully obvious that the judge started with the conclusion that Hashimoto was guilty and reconstructed the evidence to support his conclusion. He contradicted even the defendants' testimonies, ignored court records in favor of the "defendant's honestly held belief", failed to acknowledge some critical points such as an employees performance appraisal must be based on tasks for which she is given training and has access to the necessary information. Throughout this case serious charges were made against Hashimoto such as causing the loss of $140,000, over running a quarterly budget and failure to deliver pay checks. Under the Freedom of Information Act, Hashimoto requested proof for all the accusations such as the name of the audit team that told her to write the purchase order for $140,000 and copies of the paychecks. The district court failed to require compliance by the defendants; thereby condoning Hashimoto's persecution.

A. The District Court's Findings Were Not Based on the Evidence and Court Records.

The district court demonstrates a lack of understanding on two issues which are critical to Hashimoto's case. The first issue is the time frame of the consolidation of Special Services and Club Systems. The consolidation took place in two phases: Phase 1, the physical consolidation where people moved into a different building, occurred in September 1984; Phase 2, consolidation of the accounting system and transfer of personnel to the newly created MASU, occurred in December 1984. Joan Goodman returned to work in October 1984 when the job functions had still not been transferred and the consolidation of the records had not begun.

The second issue, where the district court demonstrates a lack of understanding, is the relationship between a position description (PD), a Basic Performance Appraisal Plan (BPAP) and a performance appraisal. A PD is derived from an organization's needs and defines, in detail, the duties and responsibilities required by the organization for that position. A PD also specifies the education, training and experience required for the position. A BPAP is a list of specific tasks derived from the PD. It lists a subset of tasks from the PD that a person in the position is required to perform. A performance appraisal is based on standards derived from the tasks on the BPAP, and an individual is rated according to these standards. According to Federal regulations, a supervisor and his subordinate must discuss and agree to the items on the BPAP 90 days before a performance appraisal is done.

The following quotes show the district court's misunderstanding of these regulations. Hinman in his sworn affidavit, at Camp Pendelton, CA on October 26, 1987 said:

> Joan Goodman … initially worked for me. They were transferred to MASU shortly after I took over as Special Services officer.

The district court contradicts Hinman in the following:

> [22] Goodman did not return to work until after the consolidation had begun. Goodman's billet was transferred to the MASU and she was never under Hinman's supervision. Appendix C, 28a

During phase 1 of the consolidation, Goodman, was on leave. She returned in October 1984, before phase 2 of the consolidation. Goodman, a white female, returned before the actual personnel and job transfers to the MASU took place. She should have been performing her original duties which was that of Supervisory Accountant
Technician. Goodman's position required double-entry accounting knowledge while Hashimoto's did not. Since Hinman had assigned Goodman's Special Services accounting books to Hashimoto, according to Federal regulations he should have negotiated a another BPAP with Hashimoto 90 days before rating her on the new tasks. He should have verified that she had the training required to do double entry accounting for Special Services. This was not done before the first letter of caution was issued on February 5, 1985. Furthermore, if the new tasks assigned to the plaintiff were the result of the consolidation, then Russ Johnson, a white male and Hashimoto's equivalent in the Club systems should have been assigned the tasks of Goodman's counterpart in the Club systems. Instead he was promoted to Director of the Club System. The district court demonstrates a lack of understanding in the following quotes:

> [23] Although Goodman's billet was transferred as part of the consolidation, this Court finds by a preponderance of the evidence that the tasks taken over by Plaintiff were assigned to her by Hinman as part of the consolidation. In performing those tasks, this Court finds that Plaintiff was performing her own assigned duties, not the duties of her co-worker Goodman, whose position had been transferred to the MASU. Appendix C, 28a

With respect to the question of annual leave, the district court misunderstands completely: Hashimoto's grievance was that she was

not allowed to take 5 consecutive days of vacation until after she was suspended. This was clearly an issue of harassment and discrimination While she was on suspension, she requested permission from Lieutenant Colonel Arent, the Executive Officer, to approve 10 days of annual leave.

> [25] Additionally, Plaintiff's allegations that all of her leave requests were denied is rebutted by the undisputed evidence from Plaintiff's Master Leave Plan that she used 106 hours of annual leave during 1985. Appendix C, 28a

In the following quote the district court confuses two unrelated events. He says that Hinman revoked Hashimoto's authority to sign any documents because she authorized a purchase exceeding a quarterly budget. First of all there is no record of this purchase order even after Hashimoto asked for it. The facts are: 1) letter of revocation was in 1984, 2) purchase in question occurred in 1985, 3) 1985 was the year of the Gramm-Rudman-Hollings deficit reduction bill where there was no budget so the Federal agencies were operating on a fraction of their normal budget; therefore, it was not possible to overrun a quarterly budget; 4) finally had the defendant produced a copy of the purchase order, as requested by the plaintiff under the Freedom of Information Act, it would have shown that Hinman had initialed it as required by
his letter of revocation.

> [26] Shortly after this incident, on November 30, 1984, Hinman revoked Plaintiff's authority to sign documents on behalf of Special Services. The Court finds by a preponderance of the evidence, that this act was necessitated by Plaintiff's act of authorizing a single purchase which exceeded an entire quarterly budget. Appendix C, 28a

The Commanding Officer of Camp Smith, G.E. Castagnetti, wrote the following:

> I find that there is insufficient evidence in support of the charge that you [Hashimoto] failed to keep your superior appraised of your whereabouts or that you failed to brief

> him [Hinman] as required. Therefore, that portion of the charge in the suspension notice is rescinded..."
> Appendix X, 109a

In the following quote the district court decided to overrule the Commanding Officer's decision despite the fact that the defendant's testimony was the only evidence that Hashimoto failed to attend daily briefings or failed to keep Hinman informed of her whereabouts:

> [29] ...Ho[illegible]er, this court finds by a preponderance of evidence that the written order was only given after repeated oral counseling failed ...Appendix C, 29a

The following quote shows that the district court fails to understand the concept of disparate treatment. Hashimoto's point was that she was treated differently from others, in this case, the athletic and recreation directors, both males. They met with Hinman in the snack bar, a social setting, whereas Hashimoto was required to report to Hinman's office twice daily. Also, this quote is an example of how the district court chooses the evidence to support its opinion: defendants were right and the plaintiff was wrong. The fact that Hal Nakabayashi said that he and the recreation director attended briefings in the snack bar, is for the district court, absolute confirmation that Hashimoto was not the only one to attend daily briefings. The second part of Nakabayashi's statement, however, could be construed as disparate treatment because two males attended meetings in the snack bar so the district court says, "...there is no evidence that the Recreation director did so."

> [30] ....The testimony of Hal Nakabayashi established that he and the recreation director would attend briefings together at times and at times would attend them separately, dependent on their
> job duties and schedules. Although Nakabayashi did testify that he did sometimes meet with Hinman in the Snack Bar,

> there is no evidence that the Recreation Director did so. Appendix C, 29a

The district court has taken the following issue out of context. The twice daily meetings with long moments of silence and sometimes vulgar behavior did occur. However, they stopped after Hashimoto complained to the Executive Officer, Lieutenant Colonel San Angelo.

> [31]Finally, Plaintiff testified that the twice daily briefings often lasted over an hour and required Plaintiff to stand in front of Hinman's desk while Hinman either sat in absolute silence or subjected her to insults and vulgar behavior. Appendix C, 29a

Sheila Mitchell, who was involved in all of Hashimoto's personnel actions, stated in her sworn affidavit that Hashimoto was the only civilian employee who had to attend daily briefings:

> Ms. Hashimoto was told by Captain Hinman to report to him each morning and each close of business so he [Hinman] could see that she [Hashimoto] was at work ... she [Hashimoto] was the only civil service employee under his [Hinman's] supervision who had to do this ...I cannot attest to what he required of his military personnel but I do know that Mr. Les Largo, a male civilian employee, Bowling Equipment Repairer, was not required to check
> in or out daily, and he was located in the Bowling Alley approximately 150 yards from Building 9 [location of Hinman's office]. One day I called Captain Hinman to ascertain the whereabouts of Mr. Largo as I had been calling him all morning and Captain Hinman had no idea if he had even showed up for work that day. Yet Ms. Hashimoto's office was right next to Captain Hinman's, and he required her to check in and out. Appendix W, 105a.

The district court, ignoring the sworn statement of Sheila Mitchell, chose to reaffirm its own opinion:

> [32] This court finds by a preponderance of the evidence, that the briefings were not required of Plaintiff alone and that all employees were required to attend. This Court further finds that the fact that Hinman occasionally held a briefing with Hal Nakabayashi in the snack bar does not constitute evidence of discrimination. Finally not one witness could corroborate Plaintiff's allegations concerning the length and content of her briefings with Hinman and this court finds these allegations to be incredible. Hinman testified that these meetings were of a few minutes duration. Appendix C, 29a

With respect to Hashimoto's Basic Performance Appraisal Plan (BPAP) and her Position Description (PD) the district court consistently failed to understand the issue. Hashimoto's grievance was that the BPAP and PD gave her responsibilities and duties for which she was refused training, did not have access to the information and resources required to perform the tasks listed. Ruth Christiansen, in her undisputed testimony said that the non-appropriated fund accounting records required to perform these duties were under lock and key and only she and Goodman had access to them:

> Q. Isn't it true that Barbara Hashimoto did not have access to the general ledger of the non-appropriated funds activities after the consolidation?
> R. It was not a ledger that was kept out in the open where she could go to it, without having permission from myself or from Joan [Goodman]
> Q. Okay
> R. It was in our custody and locked.
> Q I'm sorry?
> R. It was in our custody and always locked.
> Q. Always locked. It was locked in your office?
> R Either in my office or in the file – in Joan's office the file cabinet in Joan's , as are all books of record.
> Appendix J, 78a - 79a

The follow quotes, [34] and [35] show the district court's confusion over the issue involving the PD and BPAP. Hashimoto refused to sign the BPAP because she did not have access to the accounting records or training to perform the tasks:

> **[34]** Also on February 5, 1985, Plaintiff was given her Basic Performance Appraisal Plan (BPAP).This document listed the critical elements of Plaintiff's position and set forth standards on which her performance of those elements would be evaluated. Appendix C, 30a
>
> **[35]** The testimony is undisputed that Hinman gave Plaintiff a copy of the BPAP but the Plaintiff disagreed with her assignment of duties as outlined in the document. For that reason, Plaintiff refused to sign the BPAP acknowledging that the elements and standards had been set. Appendix C, 30a

When Hinman contacted the personnel office, he did not tell them about Hashimoto's tasks that had been transferred to the MASU as a result of the consolidation, and since the personnel office did not interview Hashimoto before evaluating the position description (PD), it should not be a surprise to anyone that the personnel office found that there was nothing to change:

> **[36]** ...Hinman made attempts to have Plaintiff's PD rewritten but the personnel office returned the rewrite, stating that even after the revision, "the position remains classifiable as Budget Assistant, GS-561-7." Appendix C, 30a

Although Joan Felman of the personnel office testified that Hashimoto's PD and BPAP were accurate the court records prove otherwise. The following lists each of the items on Hashimoto's BPAP and references the official records indicating the responsible party:

1) BPAP Task 1: Prepares budget reports and correspondence involving Special Service Non-appropriated Funds

   In Appendix J, 78a Ruth Christiansen agrees that the General Ledger of the Non-appropriated funds activities after the consolidation was under lock and key and that only she and Joan Goodman had access to the books of record

2) Administers accounting, reporting & budgeting of Special Services Appropriated Funds

   In Appendix K, 80a, Captain Lowery agreed that effective Feb. 1986 he assumed the responsibilities for appropriated funds allocated by the Camp Comptroller for the Morale Welfare and Recreation unit. The document specifically states that Hashimoto was relieved of those duties

3) Analyze Budget Variance & advises Special Services Officer on financial matters that effect NAF (non-appropriated funds) and appropriated funds

   In Appendix L, 81a Hashimoto issued a memo pointing out the discrepancy (variance) in the interest income for Special Services non-appropriated funds based on the report generated by the Management Information Systems under Ruth Christiansen

4) Ensured effective property control procedures are utilized for Special Services, Supply and Plant Property

   In Appendix M, 82a, Charles Levesque was appointed responsible officer for Morale Welfare and Recreation supply inventory and plant property in Nov. 1985. The document specifically states that Hashimoto was relieved of those duties as of that date

5) Trains Activity Mangers on Financial Management

   There is undisputed testimony that Lowery denied Hashimoto's request to sit in the classes for Management Information System because of "security" reasons while Goodman and Christiansen, white females were allowed

\

Thus, the court records prove that for Items 2 and 4 on the BPAP, Lowery and Levesque had relieved Hashimoto of her duties 90 days before her rating, and for Items 1 and 5, there is undisputed testimony that Hashimoto was denied the resources and training to perform her job since the consolidation in December 1984, and for Item 3, the court records proved that Hashimoto did indeed inform her supervisor of a budget variance. Nevertheless, the district court ignored the evidence on record in favor of Joanne Felman's testimony:

> [38]Shortly thereafter, Joanne Felman of the personnel office conducted a "desk audit" of Plaintiff's position. Felman testified that this involved her visiting Plaintiff's work site and jointly reviewing the PD, BPAP, and Plaintiff's current duties with Plaintiff. Felman testified that Plaintiff's PD and BPAP were accurate during this time frame and that her assignment of duties under the BPAP was appropriate. Appendix C, 31a

The issue regarding the accuracy of Hashimoto's PD/BPAP arose as a result of a reorganization in which the Special Service section was consolidated with the Clubs system to form the Morale, Welfare and Recreation (MWR) unit. The Commandant of the Marine Corps explicitly states: "the general duties and responsibilities and the recreation fund custodian [plaintiff] will no longer be required as they currently exist." Appendix G, 73a.

The organization chart in this directive shows that the elements of the PD and BPAP that Hinman insisted that Hashimoto operate under had been transferred to the MWR. These elements were being performed by Goodman and Christiansen who had the information under lock and key. By being evaluated on elements being performed by Goodman and Christiansen, white females, Hashimoto was being setup to be blamed for their errors.

> [40] This court finds, by a preponderance of the evidence, that Plaintiff's PD and BPAP accurately reflected the work that Plaintiff was required to perform and upon which her performance was evaluated. This court further finds that Hinman's

> evaluation of Plaintiff based on these documents was motivated by the honestly held belief that the PD and BPAP accurately reflected Plaintiff's assigned tasks, and was not motivated by race and/or sex discrimination. Appendix C, 31a

As shown in Hashimoto's response to district court's Item [36] Elements 2 and 4 were the responsibilities of Lowery and Levesque, two white males, in Elements 1 and 5 Hashimoto was denied training in the new computerized management information system and access to accounting data required to do the job. Hashimoto refuse to sign her performance appraisal because she felt that signing would mean that she agreed with the elements and standards on which she was rated and because Hinman did not provide evidence of the unsatisfactory/marginal work that Hashimoto did and none was entered into the court records. In the following quote, rather than evaluating all the evidence the district court summarize what the defendants claimed:

> **[41]** Plaintiff received her first mid-cycle review under her BPAP on May 1, 1985. Plaintiff's overall rating was marginal. At this time, Hinman noted a number of concerns with Plaintiff's performance of her duties. Specifically, out of five "critical elements," Hinman rated Plaintiff unsatisfactory in two (Elements 1 and 4) and marginal in two others (elements 3 and 5). Plaintiff refused to sign to acknowledge receipt of this review. This evaluation of Plaintiff performance led to another letter of Caution on June 28 1985. In addition to setting out the areas of deficient performance, this letter made suggestions concerning how Plaintiff could work to improve her performance. Plaintiff refused to sign to acknowledge receipt. Appendix C, 31a

Quotes [44] and [45] again illustrate how the district court distorts the facts. After receiving Hinman's memo of a proposed suspension dated 30 Jul 85, Hashimoto hired a lawyer, Jack

Schweigert, who wrote a letter telling Captain Lowery why each of the accusations were false. Appendix Y,110a. Captain Lowery's response further confused the matter so Schweigert asked Hashimoto to set up a meeting with the Base Commander.

> **[44]**....delay on his part caused by his investigation merited a mitigation of the penalty to an admonishment. This court finds that the actions of Hinman and Lowery were motivated by the honestly held belief that Plaintiff was negligent in the performance of her job duties and not by any discriminatory animus. Appendix C, 32a

See Schwiegert's letter to Lowery. Appendix Y, 110a

> **[45]** .....Plaintiff could have requisitioned clerical help through MASU, but this Court finds, by a preponderance of evidence, that she ignored instruction to do so. Appendix C, 32a

In the following quote the district court misrepresents Hashimoto. She said that clerical help was not always available. Since the clerks worked for MASU, that work had higher priority. More appalling, however, is the district court's failure to recognize the disparate treatment when Hal Nakabayashi, a male, did his own typing and was not disciplined for doing so while Hashimoto was.

> **[46]** Plaintiff's allegations that her male counterparts had clerical help attached to them is rebutted by the testimony of other witnesses. ... Indeed, the undisputed testimony of Hal Nakabayashi established that he did his own typing.". Appendix C, 32a

In Item **[47]** Appendix C, 33a
the district court fails to ask a critical question: Why is Hashimoto, who is being charged with over running a quarterly budget, and with poor performance in preparing budget reports, training other managers and implementing procedures for property control, now being charged with failure to do the work of a payroll clerk? This is another instance where the defendant did not furnish proof of the accusation.
She asked for copies of the front and back of the

undelivered paychecks. There are no court records of the undelivered paychecks because there were no paychecks to be delivered on that day.

The undisputed testimony is that Hashimoto worked on a Saturday in August 1984, with Maria Alivor. Captain Sowell, the comptroller, told her that she would not get paid for the day worked, but she would receive comp time. Hashimoto wanted the compensatory time off the day after Thanksgiving but was refused by Hinman. Lowery said that if she did not work that day the consolidation would be set back a whole month. After that it was difficult to take time off because Hinman told her that inorder for her to take vacation she had to find someone to substitute for her. After about 15 months she had time for annual leave and she decided that this would be a good opportunity to receive credit for the overtime worked a year earlier.

Hashimoto's 5-day suspension was based on the charges that: 1) she refused to change her time card when she took comp time for that day. 2) refused to deliver paychecks on a non-payday, and 3) failed to attend twice daily briefings and keep Hinman appraised of her whereabouts. Delivering pay checks was the responsibility of the payroll clerk, not Hashimoto. The BPAP on which Hashimoto was given a marginal rating contains no item that would possibly include pay check deliveries. Furthermore, there were no paychecks to be delivered on the day in question, and finally, this is an issue of discrimination because the standard practice was that the payroll clerk gave each supervisor the paychecks for their subordinates. The supervisors in turn distributed the paychecks. Hashimoto was asked to be responsible for the recreation director's, a white male, paychecks and then to personally deliver Ms. Mau's pay check.

> [49] Appendix C,32a and
> [52] This court finds that the evidence establishes that Hinman and Lowery honestly believed that the five day suspension was warranted for the reasons set out above. A preponderance of the evidence demonstrates Plaintiff refused to follow the instructions of Hinman and was

> p suspended accordingly. This court finds no evidence of discrimination on the part of either Hinman or Lowery related to this adverse personnel action....

The district court clearly demonstrates its bias when it says that this was an increasing level of punishment because lesser measures had not succeeded. As explained above, the time card incident was time promised her by Captain Sowell for working on a Saturday; the pay check delivery was impossible—there is undisputed testimony that the day in question (Nov 22, 1985) Appendix Q, 91a. was not a pay day and furthermore, the defendants failed to produce proof of the undelivered pay checks as Hashimoto had requested under the Freedom of Information Act and the district court again failed to force compliance by the defendants. Therefore, since all charges with respect to this 5-day suspension was baseless, this must be retaliation. Retaliation for seeing an EEO counselor.

> [52] ...Additionally, the court notes the testimony of Lowery that this suspension was part of an increasing level of punishment because earlier, lesser measures had not succeeded in encouraging Plaintiff to perform her assigned job duties and follow instructions from her supervisors. Appendix C, 34a

When Hashimoto was served notice of the 5-day suspension, she contacted a lawyer, Jack Schweigert, who responded to the letter. See Appendix Y, 110a-114a. Schweigert asked her to arrange a meeting with the Base Commander. The base commander must have contacted Lowery because Lowery asked Hashimoto to put the request in writing. Mr Schweigert said that the reason for the meeting was to discuss his response to the 5-day suspension and that a sealed letter was not necessary. Defendants did not produce any regulations stating that this was base procedure.

> [53] On December 9, 1985, Plaintiff requested a meeting with the base commander through Lowery. The Court finds, by a preponderance of the evidence, that Lowery denied this meeting because Plaintiff failed to follow base procedure by submitting the request, in writing in a sealed envelope, to Lowery for submission to the base commander. Appendix C, 34a

Captain Hinman initiated another crisis when he sent Hashimoto a very confusing memo ordering her to prepare a turn over file as a letter of instruction. Appendix S, 99a. Captain Lowery, one of the defendants, clearly defines the difference between a turnover file and a letter of instruction when asked: "Do you know what Hinman meant by a turnover file in the form of a letter of instruction?":

> L. That's confusing two terms. And I've seen that in one of the statements. In fact, I think it was one of Ms. Hashimoto's. ...A turnover folder is just that as it's something that
> you can turn over to somebody who's going to replace you. So that if you get hit by a car the day they can pick up the book. ....
> Q. So your understanding is that the proper document to have been done in this case was a turnover folder.
> L. That's correct. There's no necessity nor did we ever deal with anybody with the letter of instruction. Somebody's just administratively
> confusing two things, that's all. Appendix O, 87a

In quotes [54] and [55] Appendix C, 34a, the district court considers Hashimoto's attempt to seek clarification from Hinman as "confrontation even after Lowery, in his testimony said "There's no necessity nor did we ever deal with anybody with the letter of instruction. Somebody's just administratively confusing two things..."

There is undisputed testimony that when Hashimoto was out on the 5-day suspension, Hinman had everything removed from her office. Both Hashimoto and Lowery testified that a turnover folder existed. Therefore, was Hashimoto charged for failure to follow orders because Hinman requested a turnover file in the form of a "Letter of Instruction from the Special Services Officer [Hinman] to the Budget Assistant [Hashimoto]" and she was unable to produce it, or was she charged for disobedience because Hinman did not see the turnover folder when he removed the contents of Hashimoto's office?

The end result was that Hashimoto was suspended for 14-days in 1986. At the EEO hearings in 1989, Hashimoto asked once again to see a turnover file in the form of a letter of instruction; the defendant was unable to produce one. Did Hinman assign an impossible task? Did he find the turnover file in her office? If the lack of one was worth suspending Hashimoto for 14-days, why did the defendants not have one 3 years later? Furthermore, why wasn't Joan Goodman, a white female, required to prepare a turnover folder when Hashimoto assumed the job from her? And the final question: what evidence did the district court use that it could be so sure that this was a case of outright disobedience on Hashimoto's part? Furthermore, when Lowery testified that the assigned task was "trivial" why did the district court not see it as retaliation?

> **[58]** This court finds that the evidence establishes that Plaintiff was suspended for fourteen days for failure to follow orders. This Court finds credible Lowery's testimony that even if the assigned task was trivial, Plaintiff's repeated and continuous failure to follow orders was not trivial and that a fourteen day suspension was warranted in light of the failure of previous disciplinary actions to gain Plaintiff's compliance. Appendix C, 35a

In December 1985, the personnel office was notified that Hashimoto and Guessford would be RIFed, 2) Guessford was given notice in December, 3) Hashimoto's RIF was not effective until several months later, after all the suspensions had occurred and Within Grade Increase (WIG) had been denied, 4) Russ Johnson was RIFed several months later. Had Hashimoto been RIFed at the same time as Guessford, she would have been eligible for priority placement. By being RIFed after being denied the within grade increase (WGI) had occurred Hashimoto was not eligible for priority placement. In the following quote, the district court's distortion of facts allows him to support the defendants' discriminatory treatment of Hashimoto. See **[60]**. Appendix C, 35a

In quote [61] Appendix C, 36a, Hashimoto was discriminated by her RIF because she was not allowed to take the classes in the Management Information system; therefore when Christiansen's and Goodman's positions were vacated, she was not eligible. Director of Club systems that the court mentions was not Hashimoto's line of work. Hashimoto's RIF was retaliatory because had she been RIFed at the same time as Guy Guessford she would have been eligible for priority placement and furthermore, she was the only one RIFed at the time and also because the directive from Headquarters Marine Corps stated: "While staff reductions may occur through attrition during the implementation of the MASD organization, no reductions in force (RIF) are to be imposed. Appendix G, 72a.

The district court judge consistently applauds the honesty and truthfulness of Hinman and Lowery despite court records and testimony to the contrary. The Equal Employment Opportunity Commission discusses at length why it found Captain Lowery to be not a credible witness. For example:

> Added to the activist role taken by the MW[R] Director (Lowery) in his efforts to prevent appellant from being hired by the Army, are the numerous inconsistencies in his testimony. As aforementioned, the MWR Director had previously testified that he did not discuss appellant's EEO activity with the SBA. However, at the hearing he denied making this statement and indicated that it was made instead by the EEO Investigator. Given that the MWR Director signed and made several corrections to the affidavit that contained this inaccurate statement, we do not accept his disavowal of having made it as being credible. We also find inconsistent the fact that the MWR Director indicated that his written character reference of appellant was well thought out and that he was concerned with accuracy and thoroughness when he wrote this document. In addition, he erroneously reported therein that appellant's allegations of discriminatory treatment were found to be unfounded. At the time that the MWR Director completed the letter of inquiry from the Army, appellant's complaint was still at the investigatory stage.

> Another glaring inconsistency on record is the fact that the MWR Director went back and forth on whether he understood the meaning of the term protected activity. In light of the inconsistencies in the MWR Director's testimony, we find that he was not a credible witness and that his articulated reasons for discussing appellant's EEO activity with the SBA are unworthy of credence. Appendix B, 14a, 15a.

The fact that Lowery, in his testimony, thought that Hashimoto was the one who confused turnover files with a letter of instruction was proof that he, as the deciding official, did not conduct an objective investigation. For had he done so, he would have known that it was Hinman who was confused about turnover files in the form of letter of instruction. Therefore, Lowery did not give Hashimoto just consideration according to the regulations of the Office of Personnel Management (OPM) (§771.302(b)).

One has to wonder to what extent the district court would rationalize for a defendant because in Hinman's memo to Hashimoto dated Feb. 18, 1986, he stated that Hashimoto was away from work for 3 weeks and then he refers to a Feb 10, discussion with her that was within the 3 weeks. Appendix V, 103a. This is one of his typical retaliation efforts to fabricate "proof" of Hashimoto's disobedience. Unfortunately, in this instance he tripped!

> [66] Finally, on the issue of credibility, witnesses testified that Plaintiff's character for truthfulness was lacking. On the other had, witnesses uniformly testified to the fact that the character of Hinman and Lowery for truthfulness was above reproach....Appendix C, 37a.

B. The District Court Ignored Federal Laws, Statues and Regulations

According to the Subchapter 1 of Chapter 43 of Title V, United States Code, and Part 430 of Title V (§771.206 (C) (1) (viii)), an employee's performance and standards is for the individual. Hinman did not establish the critical elements and performance

standards in accordance to this law and regulation. Hinman confirms this by what he says in his Special Appraisal for Barbara Hashimoto dated November 29,1985 where he states:

> Your performance on the fourth critical element as described in reference (a) was highly satisfactory. You failed to follow instructions of conducting quarterly inventories and implementing internal control procedures but inspite of your lack of effort, control of property was effective through the efforts of other personnel. The official inventory of the Recreation Fund Property indicated a minimal loss of property. Appendix H, 75a

Hinman violated Federal Civil Service regulations: when he charged her for:

1) failure to deliver paychecks, which was the responsibility of the payroll clerk
2) over running a quarterly budget because in 1984 he revoked her authority to sign documents; therefore, he had to initial all expenditures Appendix F, 69a;
3) issuing a letter of caution for not doing an insurance report that the recreation director had already completed.
4) not training other managers because she herself was denied training. According to Hinman at the EEO hearings, the classes for the newly created Management Information system was for keypunchers, and yet he allowed Ruth Christiansen and Joan Goodman to attend. They were both, white females, several levels higher than Hashimoto..

42 U.S.C. §2000e-2d was violated when Hashimoto was discriminated against when, unlike Joan Goodman and Ruth Christiansen, she was not allowed on the job training in the computerized management information system for the non-appropriated fund accounting system. Because she was deprived of employment opportunities in the Management Information System when their positions were vacated prior to the effective date of plaintiff's RIF notice of March 3, 1986.

One of the six basic criteria for administrative grievance is: "prompt consideration of each grievance including reasonable time limits for processing the grievance." OPM (§771.302(a)).
This requirement was not followed by Capt Lowery for the 30 July 85 proposed suspension so he reduced it to an admonishment. However, the reduction to an admonishment was not in accordance with the regulations either.

Hashimoto was denied due process of law when the district court and appeals court ignored evidence that proved discrimination and harassment. The district court stated that daily briefings were not required of the plaintiff alone. However, in her testimony, Sheila Mitchell, states that Hashimoto was the only Civil Service employee who had to report to supervision. Appendix W, 104a.
The athletic director testified that he and the recreation director, both males, met with Hinman in the snack bar. Clearly this is disparate treatment since a snack bar is a social environment whereas Hinman's office is very official. Appendix N.

The defendant's own witness, Ruth Christiansen, presented unimpeachable evidence when she testified that the information required to do the work that Hashimoto was being rated on was under lock and key to which only she and Joan Goodman had access to. Appendix J. Despite the defendant's own witness testifying that Hashimoto did not have access to the accounting data required to perform the duties Hinman rated her on, the district court validated Hashimoto's marginal rating.

C. The Appeals Court Erred in Affirming the District Court's Dismissal of the RIF Action and in Upholding the Defendant's Charge of Insubordination for Not Releasing $140,000

The findings of facts of both courts contradict precedent cases. The appeals court upheld the district court's decision to grant the government's motion to dismiss Hashimoto's claim of discrimination because she was the only one RIFed at the time. The district court stated:

> Plaintiff argues that this court has jurisdiction over her reduction in force claims because plaintiff did not pursue those claims before the MSPB but instead chose to pursue them with the EEOC. However, in *Hays v. Postmaster General*, 868 F.2d 328 (1989), the Ninth Circuit held that a plaintiff may choose to bring a mixed case either before the MSPB or the EEOC but not both. When a plaintiff institutes an action before the MSPB but fails to raise a discrimination claim there, a district court lacks jurisdiction to hear the claim. Appendix A, 3a.

The district court refused jurisdiction over the Reduction In Force (RIF) action because it said that Hashimoto failed to raise a discrimination claim before the Merit System Protection Board (MSPB). This finding is contrary to Hashimoto's MSPB Appeal as indicated in her response to Items 24 and 25: Appendix R, 95a

> 24. If you believe you were discriminated against by the agency because of either your race, color, religion, sex, national origin, marital status … indicate so and explain why you believe it to be true. Indicate examples how you were discriminated against.
> [Plaintiff's response: see formal EEO complaint]
> 25. Have you filed a discrimination complaint with your agency? [Plaintiff's response: YES]

The Ninth Circuit should have applied its precedent case *Washington v. Garrett*, because, the case is a mixed case. A mixed case has two elements 1) failure to follow Federal Personnel Regulations which are normally under the jurisdiction of the MSPB and 2) a claim of discrimination under Title VII which is under the jurisdiction of the district court. *Vinieratos v United States, Department of the Air Force* 939 F.2d 762, 766 n2 (9th circuit, 1991) In a mixed case, judicial review must be sought in district court under the applicable discrimination statues. *Washington v. Garrett,* 10 F.3d 1421(9th circuit 1993) citing *Romain v. Shear*, 799 F.2d 1416, 1421 (9th circuit 1986)

Hashimoto's case is clearly a mixed case in that at the MSPB she stated in her MSPB Appeal Appendix R, 95a that she felt that she had been discriminated against and that she had filed an EEO complaint on March 5, 1986.Because Hashimoto's RIF action was still pending with the EEOC, she did not pursue her claim before the district court until the EEOC had made its finding.

The district court's claim that the RIF was not discriminatory was erroneous. *Washington v. Garrett*, 10 F.3d 1421 (9th circuit 1993) explicitly states:

> A reduction in force may not be used as a disguise for an adverse action to remove or demote a particular employee. *Gandola v. Federal Trade Commission*, 773 F.2d 308, 312 (Fed circuit 1985). If an employee is removed through a reduction in force because of dissatisfaction with his performance, the reduction in force is improper with respect to that employee. See also, *Liguori v. United States Military Academy,* 4 MSPB. 100, 101, MSPR. 6, 7 (1980). In other words, a RIF may not be undertaken for reason person to the employee. Mead 687 F.2d at 286; Liguori v. United States Military Academy, 4 MSPB. 100, 101, 4 MSPR 6, 7 (1980).

Captain Lowery, the defendant, in his testimony states that Hashimoto was the only one RIFed at the time. Sheila Mitchell affirms this fact in her affidavit, Appendix W, 104a:

> Yes, I agree with Ms. Hashimoto. I believe that Captain Hinman and Capt Lowery did not like Ms. Hashimoto and abolishing her position was the only way they could get rid of her. I was told by Captain Hinman and Carl Sherbondy, Director, Morale Administrative Support Unit, that they would like to establish a Program Analyst position to absorb some of Hashimoto's duties. And establish some additional ones that would benefit the Command. There was no ceiling point available for this position so they considered establishing it as a non appropriated fund position. As of the time I vacated the position in august 1986, no such position had been established. As the paper work was being processed to RIF Ms. Hashimoto and

abolish her position, (some or all) of her duties were absorbed by Debbie O'Kamoto and then Stephanie Strickland when Debbie left for another position. I cannot swear that all of Ms. Hashimoto's duties were assumed, but the ones requiring her to deal with the accounting personnel in my office were as both persons came into our office with the same questions that Ms. Hashimoto had previously come for. I believe her duties were still required and were assigned to someone else.

[32:1] Trial Proceedings 10/22/93 (Testimony of Captain Lowery)

Q. And after Barbara Hashimoto left Camp Smith, you recommended that a program analyst position be created at Camp Smith to handle the Financial affairs for MWR unit, did you not?

A. Yes, I did.

Q. And that position would control the appropriate funding, budgeting, variance analysis training managers, and financial steps; is this correct?

A. That sounds right.

Q. And you made recommendations after Mrs. Hashimoto had left Camp Smith?

A. I couldn't swear to that. I don't know. I would have to look at the dates and compare the two to be able to answer that.

Q. But around that time she was leaving; is that right?

A. That's probably right. I can relate the two because—you know the two weren't specifically related. One was the cause or effect, for instance. If you are just asking me on a time line then two things occur, and it was probably in the spring of 86 or 87. The reason I would say that is it was my last year there.

Q. And the position was called program analyst?

A. I think that was my recommendation, yes.

The Facts Behind the $140,000:

In *Hashimoto v. Dalton, 681*, the appeals court stated:

> Plaintiff failed to articulate how the requirement of a signature by a superior to release the money undermines Lowery's statement in the job reference that she failed to follow guidance from the audit team—thus failing to establish inconsistency between the statements."

This is an excellent example of why Hashimoto asked the appeals court to review the district court's findings of fact. There was no "audit team". The commandant of the Marine Corps had issued a directive stating that all excess working capital had to be returned to headquarters. By Federal regulations, Hashimoto was allowed to sign for a maximum of $2500; therefore, she would have to signed 50 purchase orders to cover the amount. Hashimoto felt that this was morally and ethically wrong. Also, IF this was illegal, who would be responsible?

Finally, the district court ignored the gross misconduct on the part of Hinman for charging Hashimoto with disobedience because she refused to sign a $140,000 purchase order. Federal regulations allow a budget assistant to sign for a maximum of $2500. Hinman ordered Hashimoto to compromise herself ethically, morally and legally, and the district court chose not to address this issue but rather to affirm that Hinman was a credible witness. This finding should put in grave doubt the district court's credibility since it ignored Lowery's false statement about Hashimoto misappropriating $17,000. Again, the defendant failed to furnish proof of this serious accusation. (Tr 10/21/93 pages 183-184)

D. The Appeals Court Held that Barbara Hashimoto has Successfully Demonstrated the Elements in a Retaliation Claim.

The district court should have never granted the defendant's summary judgment because the plaintiff had succeeded in establishing the elements of a retaliation claim. 1) the plaintiff was engaged in protected activity, 2) she suffered an adverse employment decision, and 3) there was a causal link between her activity and the employment decision. *Folkerson v. Circus Enterprise, Inc.*, 107 F.3d 754, 755 (9th Circuit 1997).

The district court stated that the plaintiff had satisfied the last two elements but not the first element, engaged in protected activity. *Hashimoto v. Dalton*, 118 F.3d 671, 679 (9th Circuit 1997). However, contacting an EEO officer is protected activity, *Eastland v. Tennessee Valley Auth.*, 704 F.2d 613, 627 (11th cir. 1983), and a plaintiff is engaging in Title VII proceeding when consulting with an EEO counselor *Gonzalalez v. Bolger*, 486 F. Supp 595, 601 (D.D.C. 1980).

The plaintiff was engaged in protected activity when she went to the EEO officer to discuss the failure of her supervisor to update her job description. Although at the end of the EEO meeting, the plaintiff did not feel it was a discriminatory action; the district court erred in focusing on this fact. Id, at 680. In *Gifford v. Atchinson, Topeka and Santa Fe Ry. Col*, 685 F.2d 1149, 1156-1157 (9th Circuit 1982).

Although the appeals court found the above argument to be "compelling", the appeals court found a more fundamental error in the district court's decision. In *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th cir. 1978), the court found that there were two ways in which there can be a retaliation violation by an employer: 1) if the [adverse employment action] occurs because of the employee's opposition to conduct made an unlawful employment practice by the subchapter, or 2) if it is in retaliation for the employee's participation in the machinery set up by Title VII to enforce its provisions. *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Circuit 1997), quoting *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Circuit 1978), (interpreting 42 U.S.C. §2000e-#(a) (§704 (a)).

The appeals court found the error of the district court by not applying the participation clause which there can be little doubt that Hashimoto's visit with the EEO counselor constituted participation in the machinery set up by the Title VII. As such it was protected activity. *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Circuit 1997).

Conclusion

Throughout the proceedings of Hashimoto's Title VII case the defendants have made many serious charges, without furnishing, concrete evidence of these charges. But what is more appalling is that the district court allowed a person's career to be destroyed on

allegations without proof. When one reads the district court's "Findings and Fact and Conclusions of Law", one cannot help but conclude that Hashimoto is a lying, thieving, incompetent and insubordinate troublemaker. However, if all the evidence and court records were objectively examined, one could come up with a different picture.

Throughout this action, the defendants claimed that Hashimoto failed to perform her duties, one of which was to train managers. In most cases she was not able to because she herself was denied training. However, she provided informal training whenever the occasion arose.
For example, Hinman told Hashimoto that he wanted to create a fund from which military personnel would be given $20 gift certificates each year. Hashimoto explained to Hinman that it would cost $50,000 to implement the program, and since the fund earned $3000 per year, it would be bankrupt within 2 to 3 years. This is but one example where Hashimoto tried to do her job properly.

The petition for a writ of certiorari should be granted. The district court erred in its findings of fact and conclusions of law, and the appeals court, assuming that the district court examined all the evidence, upheld the picture of Hashimoto that the district court painted.

Dated: Honolulu, Hawaii, March 31, 1998

Respectfully submitted,

Barbara Mutsuko Hashimoto

Barbara Mutsuko Hashimoto
Pro Se
1538 Ala Amoamo Street
Honolulu, Hawaii 96819
(808) 839-1507

Appendix W

AFFIDAVIT OF SHEILA MITCHELL IN RESPONSE TO DISCRIMINATION COMPLAINT INVESTIGATION COMPONENT, SAN DIEGO CA LTR OF 10 NOVEMBER 1986

STATE OF Virginia
COUNTY OF Arlington

I, Sheila Marie Mitchell, Secretary (Typing GS-6
(title and grade of position)
at Arlington, Virginia hereby solemnly swear
(swear or affirm)

In response to DCI, Discrimination Complaint Investigation Component, San Diego, CA ltr of 10 November 1986, the following is submitted:

a. Yes, I was involved in all of the listed actions. I talked with Mike Long, Labor Relations Specialist, Consolidated Civilian Personnel Office (CCPO), and Captains Lowery and Hinman and picked up the paperwork on the suspensions from Mr. Long and had them signed and delivered to Ms. Hashimoto. I also dealt with Mr. Long on the withholding of the Within Grade Increase and coordinated the necessary paperwork. I prepared the SF-52 on the RIF action and dealt with Ms. Pat Peiler, Staffing Specialist, CCPO, on issuing the Notice of RIF to Ms. Hashimoto and having Ms. Hashimoto go into CCPO for counseling.

b. I did not retain copies of the file on Ms. Hashimoto so I am not positive as to the contents of her suspension letters. But I do know that both suspensions were because of not complying with her supervisor's orders. I have two comments regarding these suspensions:

(1)One is that Ms. Hashimoto was told by Ms. Barbara Sugane, Employee Relations Specialist, CCPO, to do the tasks assigned by her supervisor no matter what, yet Ms. Hashimoto chose not to follow her advise.

(2) Ms. Hashimoto was told by Captain Hinman to report to him each morning and each close of business so he could see that she was at work. I feel that this is a type of discrimination towards her because she was the only civil service employee under his supervision who had to do this. To my knowledge Ms. Hashimoto was very dependable coming to work on time and most often staying beyond quitting time so I see no reason for Captain Hinman to require her to report in and out to him. There are several Special Services personnel located throughout Camp Smith in different buildings from the one in which Captain Hinman's office is located (Building 9). I cannot attest to what he required of his military ;personnel but I do know that Mr. Les Largo, a male civilian employee, Bowling Equipment Repairer, was not required to check in or out daily, and he was located in the Bowling Alley approximately 150 yards from Building 9. One day I called Captain Hinman to ascertain the whereabouts of Mr. Largo as I had been calling him all morning and Captain Hinman had no idea if he had even showed up for work that day. Yet Ms. Hashimoto's office was right next to Captain Hinman's, and he required her to check in and out. I definitely feel he treated her differently.

c. Yes, I agree with Ms. Hashimoto. I believe that Captain Hinman and Capt Lowery did not like Ms. Hashimoto and abolishing her position was the only way they could get rid of her. I was told by Captain Hinman and Carl Sherbondy, Director, Morale Administrative Support Unit, that they would like to establish a Program Analyst position to absorb some of Hashimoto's duties. And establish some additional ones that would benefit the Command. There was no ceiling point available for this position so they considered establishing it as a non appropriated fund position. As of the time I vacated the position in august 1986, no such position had been established. As the paper work was being processed to RIF Ms. Hashimoto and abolish her position, (some or all) of her duties were absorbed by Debbie O'Kamoto and then Stephanie Strickland when Debbie left for another position. I cannot swear that all of Ms. Hashimoto's duties were assumed, but the ones requiring her to deal with the accounting personnel in my office were as both persons came into our office with the same questions that Ms. Hashimoto had previously come for. I believe her duties were still required and were assigned to someone else.

d. I do not feel Ms. Hashimoto was adversely treated because she is Japanese or a female. I feel that Captains Lowery and Hinman did not like her because she did not do everything they wanted her to and did not care for her stubborn personality so they set out to get rid of her. I honestly feel that if they hadn't been able to abolish her position, they would have continued to find things to suspend her for so that eventually they could have fired her.

e. In my opinion, Captain Lowery's actions toward Ms. Hashimoto were not due to discrimination because of her nationality or sex - but simply her personality clashed with his, and he did not like her. Lieutenant Colonel Arent and Colonel Castagnettti were not prejudiced against Ms. Hashimoto because of nationality or sex.

f. No, I am not of Japanese origin. I am a white female.

g. I would like to make one point very clear - I have no actual knowledge of Ms. Hashimoto's abilities as a budget assistant. I am not a budget/accounting specialist; therefore, cannot say if she was doing her work well. What I do feel is that she was disliked by Captains Lowery and Hinman and that they set out to get rid of her in one way or another.

I have read the above statement, consisting of 3 pages, and it is true and complete to the best of my knowledge and belief. I understand that the information I have given is not to be considered confidential and that it may be shown to the interested parties.

s/Sheila M. Mitchell
Affiant's signature:

Defendant's Exhibit 91

Subscribed and sworn to me
at Arlington Co. Virginia
on this 1 day of December, 1986

(illegible signature)
notary public

Appendix X

DECISION ON ADMINISTRATIVE GRIEVANCE FOR 5 DAY SUSPENSION BY COL. CASTAGNETTI

UNITED STATES MARINE CORPS
HEADQUARTERS AND SERVICE BATTALION, FMFPAC
CAMP H.M. SMITH
CAMP H.M. SMITH, HI 96861-3010

In reply to 12000
18 Feb 1985

From: Commanding Officer, Headquarters and Service Battalion, Fleet Marine Force, Pacific
To: Mrs. Barbara Hashimoto

Subj: DECISION ON ADMINISTRATIVE GRIEVANCE

Ref.: (a) Director, Morale, Welfare and Recreation ltr dtd 21 Jan 1986
(b) Your grievance ltr dtd 6 Feb 86

1. This is a final decision on your grievance of a five day suspension effected on 27 Jan 86 by reference (a), for your refusal to comply with the written and verbal orders of your immediate supervisor.

2. In considering the grievance I have carefully evaluated the evidence in the case as it relates to the decision made by the Morale, Welfare and Recreation director and your rebuttal argument in reference (b).

3. I find that there is insufficient evidence in support of the charge that you failed to keep your superior appraised of your whereabouts or that you failed to brief him as required. Therefore, that portion of the charge in the suspension notice is rescinded. However, the remaining charges relating to your deliberate refusal to deliver pay checks and your failure to amend your own time card are sustained in their entirety. These actions in and of themselves warrant a five day suspension, therefore, your grievance is denied.

4. There is no further right of appeal.

S/G.E. Castagnetti
G.E. Castagnetti

Defendant's Exhibit 82

Appendix Y

RESPONSE TO PROPOSED SUSPENSION
DATED 30 Jul 1985

Law Offices of
Schweigert & Associates
250 South Hotel Street, Suite 200
Honolulu, Hawaii 96813
Telephone (808) 533-7491

August 8, 1985

Captain s. Lowery
U.S. Marine Corp
Morale, Welfare, & Recreation
Camp H.M. Smith, Hawaii 96861-5010

Re: Objection to Proposed 5-day Suspension of Barbara Hashimoto; file No. 12000-1-30 July 85; Appendices A-C

Dear Sir:

The above matter focuses on the alleged negligence, insubordination and/or other forms of misconduct of Barbara Hashimoto for whom I am legal counsel. The charges are made by one C.N. Hinman and involve "incidents" dated December 3, 1984, February 5, 1985, June 18, 1985, June 26, 1985 and March 4, 1985. Taking these "incidents" in the order they appear in the notice of suspension, Ms. Hashimoto responds as follows:

(a) As to the December 3, 1984 incident (daily briefings) (see Appendix "A"): Barbara Hashimoto admits she has not met every day with Hinman at the prescribed times of 07:30 and 16:00 hours: however, such failure was not Barbara Hashimoto's fault, but Hinman's who, on the days they did not meet, was not available

because he was in conference or otherwise off base. However, on the times Hinman was available, Barbara Hashimoto met this duty.

As to the need to meet this "duty", the word briefing is a misnomer. What really took place was pure HARASSMENT. A TYPICAL BRIEFING WOULD LAST 45-60 MINUTES. Barbara would appear in Hinman's office. He would sit and stare at Ms. Hashimoto without speaking a word. Then Hinman would speak after 5-10 minutes of staring. The statement would either be a baseless charge which Barbara would have to correct, or an insult.

One final point should be mentioned. Barbara Hashimoto has met the Special Services Chief in the unit when he has been available.

(b) As to the February 5, 1985 incident (Auditor's Report)
(c) (see Appendix "B"): A response to Auditor's Report was
(d) forwarded to Hinman by the January 22, 1985 deadline.

(c) As to the March 4, 1985 incident (Charlie Levesque Communication): It is ironic the March 4, 1985 alleged instruction by Hinman to contact Levesque comes out of order in the Proposed Suspension letter for in truth and in fact no instruction to see Levesque was made until the suspension letter itself dated July 30, 1985. (Appendix "C".)

Furthermore the instruction as given July 30, 1985 is arbitrary since Mr. Levesque is a PURCHASING AGENT, not the manager of a clerical pool. Although Barbara Hashimoto has no difficulty talking to Mr. Levesque in general and has discussed other matters with him dealing with his area of expertise and responsibility, the contention by Hinman is out of line.

Finally, Barbara Hashimoto is aware of NO backlog so the charge is BASELESS.

It must be noted that the absence of a backlog is solely through the neverending, uncompensated and dedicated efforts of Barbara Hashimoto who has had to work overtime (without pay) to meet the increased tasks heaped on her by Hinman who has not only made her do more work, but also drastically CUT HER STAFF.

(d) As to the June 18, 1985 incident (Financial Management Inspection): First of all, the instruction was not given on June 18, 1985, but rather June 25, 1985. Furthermore, although the deadline was July 14, 1985, this was a Sunday. Therefore, this deadline would be bumped to Monday which is the next business day –July 15, 1985. This deadline was met. No extension was requested. Again, the charge is BASELESS.

(e) As to the June 26, 1985 incident (Insurance letter): Although Barbara Hashimoto was ORIGINALLY instructed to ddraft a response to the insurance carrier (no one-page limit was specified), the request was withdrawn once Barbara Hashimoto explained to Hinman such a letter had already been sent. There was no refusal to obey a lawful order for no order was given. The charge is again BASELESS.

CONCLUSION

It is clear Hinman is deliberately and intentionally uttering disparaging remarks about Barbara Hashimoto to cause her injury. As to be expected, Barbara Hashimoto has suffered emotional distress as a result, justifying a claim for damages. In that regard, I have advised Ms. Hashimoto of her rights regarding injurious falsehood and defamation, but she is terrified of Hinman and AT THIS TIME would rather forgive and forget.

Notwithstanding, as an officer of the court of the State of Hawaii I must ask that Hinman be ADMONISHED for his conduct and REMOVED from the Unit as soon as possible. As to the proposed suspension, it must be rejected as a series of BASELESS CHARGES. The Navy's philosophy of being fair and just when it comes to discipline is at stake. Although what is involved here may be classified as a disciplinary problem, the real culprit is the fox who is guarding the hen house.

Regards,

s/Jack F. Schweigert
Jack F. Schweigert

APPROVED AS TO FORM OF CONTENT:

S/Barbara Hashimoto
BARBARA HASHIMOTO

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Barbara Mutsuko Hashimoto, *Petitioner* v.	Civil No. 91-00081 ACK Appeals No. 95-15960
John Dalton, Secretary of the Navy, *Respondent*	Civil No. 91-00081 ACK Appeals No. 95-15827- CERTIFICATE of SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was duly served upon the following via hand delivery and/or depositing in the U.S. Mail postage pre-paid at his/her/ last known address on 31 Mar 1998

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Barbara M Hashimoto
Barbara Hashimoto
Pro Se

Supreme Court, U.S.
FILED

No. 97 1644 DEC 8 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1997

Barbara Mutsuko HASHIMOTO
Petitioner

vs.

John DALTON, Secretary of the Navy
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

APPENDIX

Barbara Mutsuko Hashimoto
Pro Se
1538 Ala Amoamo
Honolulu, Hawaii 96819
Telephone No.: (808) 839-1507

APPENDIX

Appendix A - ORDER RE DEFENDANT'S MOTION FILED 1/21/92 TO DISMIS OR IN THE ALTERNATIVE FOR SUMMARY JUDGEMENT 1a

Appendix B - GRANTING AND DENIAL OF REQUEST TO REOPEN BY U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASH., D.C. 20507 ..... 5a

Appendix C - DISTRICT COURT ORDER VACATING JURY VERDICTS AND DECISION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW 21a

Appendix D - JUDGEMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JULY 3, 1997 ..... 44a

Appendix E - UNITED STATES NINTH CIRCUIT COURT OF APPEALS DENIAL OF SECRETARY OF NAVY'S PETITION FOR REHEARING 68a

Appendix F - REVOCATION OF AUTHORITY TO SIGN CORRESPONDENCE DATED 30 NOV 84 ..... 69a

Appendix G - ESTABLISHMENT OF COMPUTER SUPPORTED MANAGEMENT INFORMATION SYSTEM (MIS) FOR MARINE CORPS CLUB AND RECREATION PROGRAMS 70a

Appendix H - SPECIAL APPRAISAL OF PERFORMANCE DATED NOV 29, 1985 ..... 75a

Appendix I - WITHHOLDING OF WITHIN GRADE INCREASE DATED APR 23, 1986 ..... 76a

Appendix J - IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII; TRANSCRIPT OF PROCEEDINGS; OCTOBER 20, 1993, pp. 109-110; PARTIAL TRANSCRIPT OF RUTH CHRISTENSEN.
..... 78a

Appendix K - CAPT. LOWERY'S INSTRUCTION ASSUMING RESPONSIBILITIES FOR APPROPRIATED FUNDS FOR MWR.
..... 80a

Appendix L - MEMO FROM BARBARA HASHIMOTO TO CAPT. HINMAN REGARDING NON-APPROPRIATED FUNDS DISCREPANCIES IN FINANCIAL STATEMENTS COMPLETED BY RUTH CHRISTENSEN UA-11
..... 81a

Appendix M - COMMANDING OFFICER RELIEVING BARBARA HASHIMOTO GS-7 OF ALL INVENTORY AND PLANT ACCOUNT EQUIPMENT AND APPOINTING CHARLES LEVESQUE UA-9. DATED 12 NOV. 1985
..... 82a

Appendix N - IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII; TRANSCRIPT OF PROCEEDINGS; OCTOBER 20, 1993, pp. 55-57 PARTIAL TRANSCRIPT OF HAROLD NAKABAYASHI. CROSS EXAMINATION SHOWING HE DID TAKE COMPENSATORY TIME.
..... 84a

Appendix O - PARTIAL HEARING TRANSCRIPT OF CAPT. LOWERY FROM EEOC-SFDO ON WED JULY 12, 1989, PP 537-539. DURING CROSS-EXAMINATION, LOWERY RESPONDS THAT A TURN-OVER FOLDER IN THE FORM OF A LETTER OF INSTRUCTION IS CONFUSING TWO TERMS, EXACTLY WHAT PLAINTIFF HAD QUERIED CAPT. HINMAN ABOUT.
..... 87a

Appendix P - DAILY ROUTINE MEMO FROM HINMAN TO B. HASHIMOTO
..... 89a

Appendix Q - PROPOSED SUSPENSION OF FIVE (5) CALENDAR DAYS
..... 90a

Appendix R - MERIT SYSTEM PROTECTION BOARD APPEAL. ITEM 25. "HAVE YOU FILED A DISCRIMINATION COMPLAINT WITH YOUR AGENCY OR ANY OTHER AGENCY? YES (ATACH COPY)" 92a

Appendix S - REQUEST FOR TURNOVER FILE AS A "LETTER OF INSTRUCTION" (FORMERLY HANDWRITTEN) 99a

Appendix T - DEPARTMENT OF THE NAVY PERFORMANCE APPRAISAL (BPAP) ELEMENT NUMBER AND COLUMN A 100a

Appendix U - JOB INQUIRY BY CAPT. LOWERY FOR DEPT OF THE NAVY 102a

Appendix V - MEMO FROM CAPT. HINMAN STATING PLAINTIFF AWAY FROM WORK FOR 3 WEEKS AND THEN REFERRING TO A 10 FEB DISCUSSION WITH HER THAT WAS WITHIN THE 3 WEEKS 103a

Appendix A

ORDER RE DEFENDANT'S MOTION FILED 1/21/92 TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGEMENT

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

AUG 17, 1992

at 2 o'clock and 0 min. S/W.CHIN M.
WALTER A. V. H. CHINN, CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT LAW OF HAWAII

BARBARA MUTSUKO HASHIMOTO
Plaintiff

v.

H. LAWRENCE GARRETT III
SECRETARY OF THE NAVY
Defendant

CIVIL NO. 91-00081 ACK

Appendix A

ORDER RE DEFENDANT'S MOTION FILED 1/21/92 TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGEMENT

This matter having come on for hearing on July 13, 1992, at 9:00 am before the Honorable Alan C. Kay, United States District Judge, on defendant's motion filed 1/21/92 to dismiss or in the alternative for summary judgment, and Robert A. Smith appearing for plaintiff and Theodore G. Meeker, Assistant U.S. Attorney, appearing for defendant, and the Court having considered the written and oral arguments of the parties and being fully advised in the premises,

NOW, THEREFORE, it is hereby ORDERED as follows:

A. THE MOTION TO DISMISS.

1. As To Claims Allegedly Not Raised Administratively:

Defendant's motion alleges that plaintiff failed to raise the following claims administratively: (1) denial of overtime, (2) denial of leave compensation, (3) false performance evaluations, and (4) improper position description. In evaluating whether or not a claim was raised administratively, the Court must examine whether the administrative process was bypassed. Ong v. Cleland. 642 F.2d 316, 319 (9th Cir. 1981). In the present case, the administrative record reveals the plaintiff did raise these claims at the administrative level. See R. 120 plaintiff's 4/3/86 written EEO Complaint in Case 1 (EEO Case 1 Ex 13). The Court finds that plaintiff presented the particular claims in question to the administrative agency, and therefore the Court DENIES defendant's motion in this respect.

2. As to Case 2 (Plaintiff's Second EEO Complaint):

Defendant argues that plaintiff's claims based on Major Lowery's disclosure to Mr. Satake of plaintiff's EEO activity should be dismissed for several reasons. First, defendant argues that plaintiff has not established a causal connection between the Army's decision not to hire her and Major Lowery's unlawful disclosure. Considering all of plaintiff's allegations as true, as the Court must on a motion to dismiss, plaintiff has sufficiently alleged a causal connection between Major Lowery's statements about her EEO activity and the Army's decision not to hire her. The government noted testimony of Mr. Satake where he stated that the EEO information was not a

cause; and if that is the case, perhaps on summary judgment or at trial the government will prevail on the issue of causation in Case 2.

Defendant also argues that plaintiff's claims are moot. However, in order for a claims to be moot, plaintiff must be afforded complete relief. Although the ORA's decision was favorable to plaintiff, it did not award plaintiff back pay or order the Navy to provide her a comparable job; and this Court reviews de novo on appeal. Because plaintiff might be entitled to further relief, the Court finds that plaintiff's claims are not moot.

Therefore the Court DENIES defendant's motion as to plaintiff's Case 2 claims.

3. As To Plaintiff's Reduction In Force Claim:

Plaintiff argues that this Court has jurisdiction over her reduction in force claims because plaintiff did not pursue those claims before the MSPB but instead chose to pursue them with the EEOC. However, in Hays v. Postmaster General, 868 F.2d 328 (9th Cir. 1989), the Ninth Circuit held that a plaintiff may choose to bring a mixed case either before the MSPB or the EEOC, but not both. When a plaintiff institutes an action before the MSPB but fails to raise a discrimination claim there, a district court lacks jurisdiction to hear the claim.

In this case, as in Hays, plaintiff attempted to bifurcate her discrimination and nondiscrimination claims before the EEOC and the MSPB, respectively. In such circumstances, all claims must be raised before the MSPB or are jurisdictionally barred. Under the authority of Hays, the Court must dismiss plaintiff's reduction in force claims from the complaint. And, of course, the plaintiff had failed to appeal from the MSPB ruling

Therefore, as to plaintiffs reduction in force claims, defendant's motion to dismiss is GRANTED.

B. The MOTION FOR SUMMARY JUDGMENT.

Defendant argues that there is no genuine issue of material fact regarding the legitimacy of the Navy's employment actions against plaintiff. Because an employer's true motives are difficult to discern, courts generally disfavor summary judgment in Title VII cases. In order to establish an issue of material fact in a Title VII case, a plaintiff may present actual evidence of the employer's discriminatory motive. When a plaintiff chooses this method of establishing a prima facie case, very little evidence is necessary to withstand a motion for summary judgment. Lowe vs. City of Monrovia, 775 F.2d 998

(9th Cir. 1986). The Ninth Circuit has stated that any indication of discriminatory motive, including an employer's reaction to an employee's protected activity, is sufficient to preclude summary judgment.

In this case, plaintiff has alluded to the ORA's finding of reprisal by the Navy, through the actions of Major Lowery. Additionally, the ORA found Major Lowery's testimony unworthy of credence on the reprisal issue. These facts are sufficient to raise a genuine issue of material fact regarding the legitimacy of the Navy's employment actions against plaintiff.

Therefore the Court DENIES defendant's motion for summary judgment.

DATED: Honolulu, Hawaii this AUG 17 1992

s/ Alan C. Kay
United States District Judge

APPROVED AS TO FORM:

s/ Theodore G. Meeker
Theodore G. Meeker
Assistant U.S. Attorney

Appendix B

GRANTING AND DENIAL OF REQUEST TO REOPEN
BY U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, WASH., D.C. 20507

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Barbara M. Hashimoto,)) Request No. 05900823
Appellant,)) Appeal, No. 01900697

GRANTING AND DENIAL OF REQUEST TO REOPEN
INTRODUCTION

On June 6, 1990, Barbara M. Hashimoto (hereinafter referred to as the appellant), through her Representative, timely initiated a request to the Equal Employment Opportunity Commission (EEOC) to reopen and reconsider the decision in Barbara M. Hashimoto v. H. Lawrence Garrett III Secretary, Department of the Navy, EOCC Appeal No. 01900697 (May 8, 1990). EEOC Regulations provide that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish one or more of the three criteria prescribed by 29 C. F . R. §1613.235(b) .[1] The appellant bases her request on 29 C.F.R. §1613.235(b)(2) (the previous decision involved an erroneous interpretation of law or regulation or misapplication of established policy), and 29 C.F.R.§1613.235(b)(3) (the decision is of such exceptional nature as to have effects beyond the actual case at hand). For the reasons set forth herein, the appellant's request is granted in part and denied in part.

ISSUE PRESENTED

The issue presented herein is whether the Commission's previous decision correctly determined that appellant was not subjected to discriminatory and retaliatory treatment in connection with the allegations raised in her complaints dated April 3, 1986 and October 4, 1988.

---

[1]The Vice-Chairman of the Commission has recused herself from deciding this matter.

Appendix B

BACKGROUND

Appellant filed two formal EEO complaints with the agency: In the first complaint dated April 3, 1986, appellant alleged that she had been subjected to race (Japanese), and sex (female) discrimination and reprisal (prior EEO activity) when she was:

> (a) suspended for five days on January 27, 1986, due to her purported refusal to obey her supervisor's written and verbal orders;
>
> (b) notified on February 18, 1986, that her within grade increase (WGI) would be withheld due to her alleged unsatisfactory performance;
>
> (c) issued a notice of suspension for 14 calendar days on February 18, 1986, for failing to obey orders; and
>
> (d) notified on February 18, 1986, that her position would be abolished.[2]

In her second complaint dated October 21, 1988, appellant alleged that she was subjected to reprisal (prior EEO activity) when the Morale Welfare and Recreation Director (hereinafter MWR Director), gave her a negative character reference and divulged that she had engaged in EEO activity to a prospective employer from the Department of the Army (hereinafter Army), in an attempt to blackball her from obtaining gainful employment. In response to appellant's complaints, the agency issued proposed agency decisions in July of 1988 and February of 1989, proposing findings of no discrimination or reprisal. Appellant was dissatisfied with these proposed agency decisions and at her request, her complaints were forwarded to an Administrative Judge (AJ) of the EEOC for a hearing.

At the hearing stage, appellant's complaints were consolidated and the (AJ) rendered a recommended decision (RD) finding no discrimination or reprisal. Specifically, the AJ found that appellant had failed to show by a preponderance of the evidence

---

[2]As noted in our previous decision, since the abolishment of appellant's position was due to a reduction in force (RIF) action, allegation (d) supra fell

within the jurisdiction of the Merit Systems Protection Board (MSPB). Consequently, the Commission will not render a decision on allegation (d). Further, we note that the MSPB has already rendered a decision on this allegation that her five day suspension was taken for unlawful reasons. Similarly, the AJ found that appellant's 14 day suspension was proper. In connection with this allegation, the AJ also found that the testimony of appellant's first line supervisor (the Special Service Officer or SSO) was more credible than her testimony. Further, the AJ found that appellant experienced performance problems which justified the denial of her WGI. Additionally, the AJ found that although it was unfortunate that the MWR Director mentioned appellant's EEO activity in his contacts with the Army, his mentioning of this fact was not retaliatory in nature. Moreover, the AJ found that the Supervisory Budget Analyst, Army selecting official, credibly testified that his non-selection of appellant was based solely on her past disciplinary record. In its final agency decision (FAD) dated October 23, 1989, the agency adopted the RD of the AJ.

In its previous decision, the Commission affirmed the FAD. With respect to her first complaint, the Commission found that appellant failed to establish a prima facie case of discrimination in connection with her suspension or denial of her GI. Further, the Commission found that appellant did not establish a prima facie case of reprise, in connection with any of the allegations she raised in her first complaint because she had not filed any prior EEO complaints. With respect to appellant's second complaint, the Commission found that appellant established a prima facie case of reprisal, but had failed to show that the reasons articulated by the agency for its actions were pretextual. Consequently, the Commission did not ascribe any unlawful motives to the actions of the MWR Director.

Appellant began her tenure with the agency on April 2, 1984, as a Budget Assistant GS-07. As a result of RIF procedures, appellant was separated from the agency on June 2, 1986. From all indications, appellant's brief tenure with the agency was a turbulent one. Besides her suspension, appellant was counseled, given a letter of caution and formally reprimanded for her conduct. The letter of caution was issued to appellant on February 5, 1985, due to her refusal to carry out the verbal and written instructions of the SSO[3]. On May 21, 1985, appellant contacted an EEO Counselor regarding

---

[3]The letter of caution noted that appellant was insubordinate because she had failed to comply with the SSO's written and verbal order to meet with him daily and to respond to an auditor's Report. Ex. 19.

her title, her position description, and he, performance appraisal. Although appellant indicated that her problems in these areas were not really an EEO matter, the EEO Counselor characterized her contact as a "Potential EEO Complaint." Both the MWR Director and the SSO were made aware of appellants contact with the EEO office.

According to appellant, she worked on July 28, 1984, which was a Saturday. Although she was told that she could not earn overtime for that day, appellant averred that she was told that she was entitled to compensatory time. It was not until over a year later, in November of 1985, that appellant claimed credit for that day on her timecard. Appellant was told by the SSO to remove the time from her timecard and she refused. Appellant stated that she would not have attempted to recoup this time except that she was being treated badly and she wanted to express her discontent. It is also established that in November of 1985, appellant was directed by the SSO to deliver paychecks to the library and she refused. Appellant averred that she inquired why she had to deliver paychecks to the library when there as a driver who could do it faster. Appellant also averred that there were no paychecks to be delivered on the d ay in question.

By memorandum dated December 3, 1984, the SSO directed appellant to provide him with daily briefings in order to provide adequate supervision of funds. Appellant refused to attend these meetings, describing them, inter alia, as daily combat between her and the SSO. Appellant also testified that no other employee was required to brief the SSO on a daily basis. (Hearing Transcript [H.T.] p. 298). On cross-examination, however, appellant conceded that two other employees under the direct supervision of the SSO (a military staff person and the civilian Recreation Director), gave daily briefings to the SSO. (H.. pp. 299-300).

It is also established that appellant was ordered on December 1, 1985, to prepare a turnover file for the Fiscal Clerk position and she failed to carry out this order. In response to this charge, appellant averred that she was never instructed to prepare a turnover file, but rather a Letter of Instruction[4]. With respect to her failure to prepare the Letter of Instruction, appellant argued that she needed, but did not receive more time, clarity,

---

[4]The memorandum directing appellant to prepare the turnover file indicated that it should be prepared as a "Letter of Instruction." (Ex. 1, File 1).

and guidance from the SSO.[5] After appellant was separated from the agency, she submitted an application for a Budget Clerk position with the Army. According to the Supervisory Budget Analyst (SBA) of the Army, based on a negative character reference he received from the MWR Director, he decided not to hire appellant. However, the SBA indicated that appellant's EEO activity was not a factor in his decision not to hire her. (H.T. p. 386).

The MWP Director conceded in his testimony that he told the SBA of appellant's EEO activity while she was employed at Camp Smith. However, the Director testified that he made mention of appellant's EEO activity because appellant had challenged her suspension on EEO grounds and an Investigator had found that her allegations of discriminatory treatment were unfounded. (H.T. pp. 510 - 511). Additionally, the MWR Director testified that he informed the SBA that appellant had another complaint pending investigation. Id. It is also established that based on a recommendation of the MWR Director, the SBA sent him a notice of employment inquiry so that he (the MWR Director) could cut his negative character reference of appellant in writing. (H.T. p. 512).[6] Nevertheless, the Director testified that appellant's prior EEO activity did not play a role in the type of reference that he provided to the Army. (H.T. p. 515).

Contrary to his testimony at the hearing, in his affidavit to the EEO Investigator, the MWR Director averred that he had not discussed appellant's EEO activity with the SBA. (Ex. 7 p. 2, file 2). When this inconsistency in his testimony was brought to his attention, the MWR Director indicated that the affidavit, was written by the EEO Investigator and not by him. (H.T. p. 509-10). Although he signed and made several corrections of his affidavit, the MWR Director averred that he simply overlooked this portion of the document. (H.T. p. 510). At the hearing a Personnel Staffing Specialist (PSS) of the Army testified that the MWR Director called her office and

---

[5]The memorandum directing appellant to prepare the turnover file also identified two coworkers who could assist her in completing this task. The memorandum also gave appellant a month to complete the turnover file. (Ex.1, File 1).

[6]As it turned out, the MWR Director was mistaken in his belief that appellant's first complaint had been fully adjudicated. When the MWR Director spoke to the SBA in August of 1988, appellant's first complaint was still in the investigatory stage.

recommended that the Army not hire appellant. (H.T. p. 53-4). The PSS indicated that she found the MWR Director's message to be unusual because it was unsolicited. In his testimony, the MWR Director admits that he called the Army's civilian personnel office in an attempt to locate the SBA. (H.T. p. 513). However, he denied that he told the PSS that the Army should not hire appellant. (H.T. p. 530). Rather, the MWP Director averred that he told the PSS that he had negative information regarding the appellant which he wanted to put in writing. (H.T. pp. 530-1).

In an affidavit associated with appellants first complaint (designated as Agency No. 89-239), the MWR Director was asked by the EEO Investigator to "[p]lease give the appropriate date and circumstances by which [he] became aware of [appellant's] participation in protected EEO activity." In response to this question, the MWR Director responded that he did not "know what EEO protected activities' are ..." (Ex. 12 p. ,0 File 1). At the hearing, the MWR Director was asked by the AJ if he now knew what protected EEO activities were and the MWR Director indicated that he did not. (H.T. p. 543). In an earlier affidavit associated with appellant's second complaint (designated as Agency No. 89-240), however, the MWR Director averred that he "believed in the EEO process," which he equated with the military MASO process. According to the MWR Director, the MASO process, was a mechanism which he himself had used in the past. (Ex. 7 File 2).

In her request to reopen (RTR), appellant argues that the Commission's previous decision is flawed because it relied solely on the tripartite analytical scheme established in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973) and its progeny, while it ignored the analytical framework and standards established in more recent Supreme Court cases such as Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). In this respect appellant argues that she was entitled to bypass the McDonnell Douglas analytical framework with respect to her first complaint because there was direct evidence. Of discrimination. The direct evidence of discrimination, according to appellant, lies in the fact that both the SSO and the MWR Director allegedly submitted perjured testimony.

According to appellant, the Commission's previous decision failed to take cognizance of this perjured testimony because it engaged in a "slavish adherence' to the testimony of the agency's officials. Further, appellant argues the Commission's previous decision erroneously assumes that perjury can only be shown through documentary evidence or testimony from other

witnesses, instead of through the internal inconsistencies and contradictions of the agency officials' testimony. In the alternative, appellant argues that if the McDonnell Douglas analytical framework was to be employed, she met her burden of showing pretext because she succeeded in showing that the testimony of the SSO and the MWR Director was unworthy of credence.

Similarly, with respect to her second complaint, appellant argues that the Commission failed to find that the reasons articulated by the agency were pretextual because it ignored the contradictions and inconsistencies in the testimony of the agency's witnesses. Appellant also characterizes her second complaint as a mixed motives case and objects that the Commission did not rely on the analytical framework established in Price Waterhouse in discussing this portion of her consolidated complaint.

In response to appellant's RTR, the agency argues that appellant fails to raise any issues of fact or law which are deserving of the Commissioners' attention. The agency also argues that appellant's RTR is a mere reiteration of the arguments previously rejected by the Commission. Accordingly, the agency urges the Commission to deny appellant's RTR.

ANALYSIS AND FINDINGS

Upon reviewing appellant's RTR, as well as the remainder of the record, the Commission finds that there is insufficient evidence for us to disturb our previous finding that appellant was not subjected to retaliatory or discriminatory treatment in connection with the personnel actions challenged in her first complaint. With-h respect to her second complain-, however, the Commission finds that there is sufficient evidence on record showing that appellant was subjected to retaliatory treatment. It is for these reasons, as well as for the reasons discussed below that we grant appellant's RTR in connection with her second complaint and deny her RTR in connection with her first complaint.

FIRST COMPLAINT

Although we affirm the results in our previous decision, we disagree with the finding therein that appellant did not establish a prima facie case of reprisal with respect to the allegations raised in her first complaint. The Commission has interpreted §704 (a) of Title VII-in a very broad manner to provide protection for employees who engaged in oppositional or participatory Title

VII activity. See EEOC Compliance Manual §614.1 (a). Among other things, the Commission considers the filing or threatening to file an EEO complaint to be oppositional activity,. See EEOC Compliance Manual §614.5 (b) (1); Gifford v. Atchinson, Topeka and Santa Fe Railway Co., 685 F.2d 1149, 1156 n. 3 (9th Cir. 1982).

Despite appellant's failure to file an EEO complaint, when she contacted the EEO Counselor in May of 1985, she clearly meant for her contact to put the SSO on notice that she would file an EEO complaint if he did not redress what she perceived to be deficiencies in her working conditions. This is evidenced by the fact that she promptly notified the SSO of her contact with the EEO Counselor. Moreover, appellant's contact with the EEO Counselor in May of 1985 was brought to the attention of the MWR Director who was given a copy of the report written by the EEO Counselor following his meeting with appellant. The EEO Counselor identified this report as appellant's "Potential EEO Complaint." Given these facts, as well as the close proximity of time between appellant's EEO activity and the issuance of her suspension notice in December of 1988, the Commission finds that appellant established an initial crime prima case of reprisal in connection with the allegations raised in her first complaint. See Mitchell v. Baldrice, 759 F. 2d 80 (D.C. Cir. 1985).

With respect to the remaining bases of the first complaint, we concur with our previous finding that there is very little evidence that would support a finding that appellant established an initial prima facie case of discrimination. Also, or the reasons discussed infra, we disagree with appellant that there is direct evidence of discrimination in her first complaint. However, in light of the fact that this first complaint was subjected to an EEO hearing, and the agency articulated reasons for its challenged actions, we find that, rather than dispose of this complaint on the grounds that appellant failed to establish a crime facie case of discrimination, the Commission should have proceeded to determine whether the reasons articulated by the agency were legitimate or a mere pretext or discrimination. See United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983).

With respect to the allegations raised in her first complaint, the agency fully established that appellant's five day suspension was proper because: (1) she disobeyed the SSO and refused to deliver paychecks to the library, (2) she refused to provide daily briefings to the SSO; and (3) she refused to amend her timecard. Similarly, the agency argued that appellant's 14 day suspension was proper because she refused to comply with the SSO's order to prepare a turnover file. Further,: the agency presented evidence to show that the denial

of appellant's WGI was proper because appellant's performance was deficient in that she failed to (1) submit her reports in a timely manner; (2) conduct quarterly inventories; and (3) effectively train managers.

Appellant attempted to show the reasons articulated by the agency for its actions to be pretextual by, inter alia, challenging the need, usefulness, or legality of the SSO's action. The AJ found, however, that most of appellant's testimony in this regard was not credible and found the opposing testimony of the SSO to be more worthy of credence. Although appellant argued on appeal that the AJ's findings are not deserving of deferential treatment on review, we note that it is the Commission's policy to defer to the credibility findings of the AJ absent evidence of clear error. See Ronald F. Kina v. Department of Justice, EEOC Request No. 05900198 (August 20, 1990). We find no evidence of record that would cause us to reverse the credibility findings made by the AJ with respect to appellant's first complaint. Consequently, we find that appellant failed to show by a preponderance of the evidence that the reasons articulated by the agency for the challenged actions in her first complaint were pretextual.

SECOND COMPLAINT

As in her first complaint, appellant argued that there was direct evidence of discrimination in her second complaint which triggered the burdens of proof established in Price Waterhouse. In making this argument, appellant appears to equate untruthfulness with direct evidence of discrimination. However the Commission does not consider untruthfulness, even of a repeated nature, to be tantamount to direct evidence of discrimination. Untruthfulness goes to the question of credibility and the showing of pretext. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Although we find that the analytical scheme articulated in ?rice Waterhouse is not an appropriate paradigm to analyze appellant's second complaint, we find that under the traditional tripartite test established by McDonnell Douglas and its progeny, appellant has succeeded in showing that the negative character reference given by the MWR Director to the Army was retaliatory in nature. In the discussion that follows, we will examine the evidence on record which supports our finding of reprisal.

In keeping with the ruling in Aikens, as well as our previous findings that appellant established prima facie case of reprisal in connection with her second complaint, we will focus our discussion on whether the reasons articulated by the MWR Director for his action are legitimate, or merely a pretext for

reprisal. There is some inconsistency in the MWR Director's testimony regarding his reference to appellant's EEO activity in his communications with the SBA. In his affidavit, the MWR Director indicated that he made no mention of appellant's EEO activity to the SBA. At the EEO hearing, however, the MWR Director concedes that he did discuss appellant's EEO activity with the SBA.

Although he did not give an express reason as to why he made mention of this fact to the SBA, his response suggests that he discussed this matter because appellant had challenged the agency's disciplinary actions in the EEO forum, but an investigation had purportedly found that her allegations of discriminatory treatment were unfounded. (H.T. p. 511). With respect to his written character reference, in which mention was also made of appellant's EEO activity, the MWR Director indicated that his aim was to be as accurate and thorough as he possibly could. (Ex. 7 p.2 File 2).

As found by the AJ, the mere act of the MWR Director mentioning appellant's EEO activity to the SBA may not have been sufficient to support a finding of reprisal. Given the MWR Director's active role in reporting appellant's EEO activity and in recommending that he be given the opportunity to put his negative character reference of appellant in writing, however, we find that he went beyond what was required of him as a recommending official. Further evidence of the activist role taken by the MWR Director in this matter is his call to the Army's civilian personnel office volunteering to give negative information about appellant.

Added to the activist role taken by the MWA Director in his efforts to prevent appellant from being hired by the Army, are the numerous inconsistencies in his testimony. As aforementioned, the MWR Director had previously testified that he did not discuss appellant's EEO activity with the SBA. However, at the hearing he denied making this statement and indicated that it was made instead by the EEO Investigator. Given that the MWR Director signed and made several corrections to the affidavit that contained this inaccurate statement, we do not accept his disavowal of having made it as being credible. We also find inconsistent the fact that the MWR Director indicated that his written character reference of appellant was well thought out and that he was concerned with accuracy and thoroughness when he wrote this document. In addition, he erroneously reported therein that appellant's allegations of discriminatory treatment were found to be unfounded. At the time that the MWR Director completed the letter of inquiry from the Army, appellant's

complaint was still at the investigatory stage. Another glaring inconsistency on record is the fact" that the MWR Director went back and forth on whether' he understood .ne meaning of the term protected EEO activity.

In light of the inconsistencies in the MWR Director's testimony, we find that he was not a credible witness and that his articulated reasons for discussing appellant's EEO activity with the SBA are unworthy of credence. See Burdine supra. Therefore, we find that the MWR Director's character reference of appellant to the Army was tainted with retaliatory animus. In further support of this finding, we note that the MWR Director was overly zealous in his efforts to prevent the Army from hiring appellant. In reaching this finding, we recognize that we are reversing the findings of our previous decision, as well, as that of the AJ. However, we find that neither the recommended decision of the AJ nor our previous decision went far enough in considering the inconsistent testimony of the MWR Director.

As a final matter, the Commission notes that although we find the MWA Director was not a credible witness, there is nothing on record which would allow us to make a similar finding with respect to the SBA. The evidence shows that even absent the retaliatory actions of the MWR Director, appellant would not have been selected by the SBA due to her prior disciplinary record. The AJ found the SBA's testimony in this regard credible. (H.T. pp. 668-9). The evidence on record firmly supports this credibility finding of the AJ. Consequently, we will not disturb it.

In summary, the Commission finds that appellant's RTR has failed to show that the Commission erred in previously finding that she was not subjected to discriminatory treatment in connection with her first complaint designated as Agency No. 89-239. However, with respect to appellant's second-complaint, designated as Agency No. 89-240, the Commission finds that appellant has succeeded, through her RTR, to show that she was subjected to reprisal. Accordingly, that portion of appellant's RTR dealing with her first complaint is denied, while that portion of her request dealing with her second complaint is granted.

CONCLUSION

After a review of appellant's request to reopen, the agency's response thereto, the previous decision, and the entire record, the Commission finds the" appellant's request fails to meet the criteria of 29 C.F.R. §1613.235(b) with

respect to her first complaint designated as Agency No. 89-239, but that it meets the criteria of 29 C.F.R. §1613.235(b) with respect to her second complaint, designated as Agency No. 89-240. Accordingly, it is the decision of the Commission to grant appellant's request with respect to her second complaint, but to deny her request with respect to her first complaint. In keeping wish' this finding, the Commission also reverses those portions of the previous decision and the FAD which are inconsistent with the findings herein. This decision constitutes the final decision of the Commission in this matter. There is no further right of administrative appeal from the decision of the Commission on this request to reopen. In order to remedy its retaliatory actions against appellant, the agency shall take the actions ordered below.

ORDER

1. Accordingly, that portion of the agency's decision which found that appellant was not subjected to reprisal in connection with her second complaint designated as Agency No. 89-240, is hereby REVERSED. Effective immediately, the agency shall cease and desist its practices of notifying prospective employers of itsemployees' or former employees' participation in protected EEO activity.

   Moreover, the agency is ordered to remove from appellant's personnel files, the negative character reference given by the MWRDirector to the Army, which is dated August 10, 1988.

   Further, the agency is ordered to provide EEO training to the MWR Director and to all of the Supervisory staff of the Morale Welfare and Recreation Department of Camp Smith within 180 calendar days of its receipt of this decision.

2. The agency is directed to post at its facility at Camp Smith copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) cays of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees and applicants for employment are customarily posted. The agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any ether material. The original signed notice(s) is to be submitted to the Compliance Officer at the address referred to in

the Implementation paragraph within ten (10) calendar days after the expiration of the posting period.

3. If appellant has been represented by an attorney as defined by 29 C.F.R. §1613.271(d)(1)(iii), appellant shall be awarded attorney's fees under 29 C.F.R. §1613.271(d). The attorney shall submit to the agency not the Equal Employment Opportunity Commission, Office of Review and Appeals, within twenty (20) days of the decision becoming final, the documentation required by 29 C.F.R. §1613.271(d)(2) only in relation to the services he rendered in connection with appellant's second complaint, designated by Agency No. 89-240. The agency shall process this claim within the time frames set forth in §1613.271 (d) (2).

4. The agency is further ORDERED to submit a report of compliance, as provided below. The report shall include supporting documentation that the corrective action has been implemented.

IMPLEMENTATION OF THE COMMISSION DECISION

Under EEOC Regulations, compliance" with the Commission's corrective action is mandatory. The agency must submit its final report of compliance to this Commission within thirty (30) calendar days of completing the corrective action required by this decision. See 29 C.F.R. §1613.237(b), (c) (1989). The agency's report must be forwarded to the Compliance Officer, Office of Review and Appeals, P.O. Box 19848, Washington, D.C. 20036. A copy of the report must be sent to the appellant.

Appendix B

STATEMENT OF APPELLANT'S RIGHTS - ON REQUEST TO REOPEN

RIGHT TO FILE A CIVIL ACTION

You are hereby notified that there is no further right of appeal from a decision of the Commission on a Request to Reopen. You have the right to file a civil action in an appropriate United States District Court WITHIN THIRTY (30) DAYS of the date that you receive this decision. As to any claim based on the Age Discrimination in Employment Act of 1967 (29 U.S.C. §633a), you MAY have up to six years after the right of action first accrued in which to file a civil action. See Lehman v. Nakshian, 453 U.S. 156 (1981); 29 U.S.C. §633a(f); and 28 U.S.C. §2401(a). If you file a civil action, YOU MUST NAME THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD AS THE DEFENDANT IN THE COMPLAINT. Agency or department means the national organization, and not the local office, facility or department in which you might work. DO NOT JUST NAME THE AGENCY OR DEPARTMENT. You must also state the title of the official agency head or department head. Failure to p-provide the NAME AND OFFICIAL TITLE of the agency head or department head may result in the dismissal of your case. Fed. R. Civ. P. 25(d)(2).

Appendix B

RIGHT- TO REQUEST COUNSEL (R990)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et sea.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request in within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action MUST BE FILED WITHIN THIRTY (30) DAYS from the date you receive the Commission's decision.

FOR THE COMMISSION:

12-31-90
Date

s/ Frances M. Hart
Frances M. Hart
Executive Officer
Executive Secretariat

Appendix B

NOTICE TO EMPL0YEES
POSTED BY ORDER OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
An Agency of the United States Government

This Notice is posted pursuant to an Order _____ dated by the United States Equal Employment Opportunity Commission which found that a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et sea. had occurred at this facility.

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE or PHYSICAL or MENTAL HANDICAP with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

The Department of the Navy, will comply with such Federal law and will not take action against individuals because they have exercised their rights under the law.

The Department of the Navy will comply with the corrective action ordered by the Commission. The Department of the Navy will ensure that officials responsible for personnel decisions and terms and conditions of employment will abide by the requirements of all Federal equal employment opportunity laws.

The Department of the Navy, will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, Federal equal employment opportunity law.

_____

Date Posted: _____

Posting Expires: _____

29 C.F.R. Part 1613

Appendix C

DISTRICT COURT ORDER VACATING JURY VERDICTS AND DECISION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF-HAWAII

BARBARA MUTSURO HASHIMOTO, Plaintiff,

vs .

JOHN H. DALTON, SECRETARY OF THE NAVY, Defendant.

CIV. NO. 91-00081 ACK

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

DEC 01, 1992

at 2 o'clock and 0 min. S/W.CHIN M.
WALTER A. V. H. CHINN, CLER

ORDER VACATING JURY VERDICTS
AND
DECISION
AND
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Two juries awarded Plaintiff $300,000 and $280,000, respectively, in compensatory damages. However, the United States Supreme Court has subsequently ruled that the 1991 amendments to the Civil Rights Act of 1964 do not apply retroactively (contrary to an earlier holding of the Ninth Circuit); and therefore Plaintiff was entitled to neither a jury trial nor to any compensatory damages. It remains for this Court, as the trier of fact, to decide whether Plaintiff is entitled to any equitable relief including attorneys' fees and costs, backpay, reinstatement, and prejudgment interest. Those are the only remedies available to Plaintiff.

This is a Title VII case brought by an Asian-American female against the Department of the Navy. Plaintiff alleges disparate treatment on the basis of race and/or gender because of adverse personnel actions taken against her while employed as a budget assistant at Camp Smith. Plaintiff also alleges that Defendant subsequently retaliated against her for filing an EEO complaint when Defendant gave a negative job reference and mentioned her EEO activities to a prospective employer. The retaliation issue (Case 2) was bifurcated from the disparate treatment issue (Case 1) for purposes of trial.

After a first jury trial on the Case l issue of disparate treatment, a Jury returned a verdict for Plaintiff. The jury found that Plaintiff's gender and or race was a motivating factor in causing Plaintiff to be suspended for 14 days and in being denied a Within Grade Increase in salary. The jury further concluded that Plaintiff would not have suffered these adverse actions had not Defendant considered Plaintiff's race and/or gender. The jury awarded Plaintiff $14,000 in compensatory damages for the 14 day suspension and $286,000 in compensatory damages for the denial of the Within Grade Increase.

Defendant subsequently filed a motion for judgment as a matter of law, or in the alternative, for new trial in Case 1. This Court denied Defendant's motion for judgment as a matter of law, but granted Defendant's motion for new trial. In summary, in ordering a new trial the Court found that (1) the jury's verdict was against the clear weight of evidence; (2) Plaintiff lacked credibility, and her testimony constituted virtually the only evidence tending to show racial or gender discrimination on the part of Defendant; (3) Plaintiff's counsel utilized improper jury argument; and (4) the jury's damages award was excessive. The evidence presented at the first trial was too vague to establish $300,000 in compensatory damages, particularly when Plaintiff's counsel only requested a figure of $200,000 and was admittedly surprised by the size of the verdict.

A second Case 1 trial was held in October 1993. During this trial, Plaintiff's counsel no longer utilized improper jury argument and when the Jury returned its verdict, it found that the denial of Plaintiff's Within Grade Increase by Defendant was not based on race and/or gender discrimination. The Jury found, however, that Plaintiff was discriminated against when she was suspended for fourteen days and awarded her $280,000.00 in compensatory damages.

The Court then proceeded to try Case 2 before the same Jury. Plaintiff was allowed to accept as binding the finding of the Equal Employment Opportunities Commission that Major Lowery had unlawfully retaliated against Plaintiff by making a negative job reference, but she was allowed to relitigate the issue of whether she would have been hired by the Army in the absence of the negative Job recommendation. The Jury returned a verdict which held that the negative reference was a motivating factor in the Army's decision not to hire her, but that Plaintiff would not have received the position even in the absence of the negative reference.

After the second trial, Plaintiff moved this Court for equitable relief including

attorneys' fees and costs, backpay, reinstatement, and prejudgment interest. Defendant again moved for Judgment as a matter of law, or, in the alternative, for a new trial on the issue of the fourteen day suspension and damages.

Throughout the litigation of this case, the Court and parties have been aware that the issue of the retroactivity of the 1991 amendments to the Civil Rights Act of 1964 was argued before the United States Supreme Court in October 1993 and pending before the Supreme Court. The Ninth Circuit has held that the amendments apply retroactively. See Estate of Reynolds v. Martin, 985 F.2d 470 (9th Cir. 1993). In anticipation that a finding by the Supreme Court that the amendments were not retroactive would eliminate the right of Plaintiff to a Jury trial and compensatory damages, this Court deferred from ruling on Defendant's post-trial motion for judgment as a matter of law or new trial (as well as on Plaintiff's motion for equitable relief). Additionally, in order to avoid a third trial in the interests of justice and judicial economy, this Court ordered the parties to submit proposed findings of fact and conclusions of law based on the evidence admitted during the second trial.

Subsequent to this, the Supreme Court has ruled that the 1991 amendments to the Civil Rights Act of 1964 are not retroactive. Landgraf v. USI Film Products, No. 92-757, 1994 WL 144450 (U.S. April 26, 1994). Accordingly, Plaintiff was not entitled to a jury trial or compensatory damages and Defendant's motions are moot. Hence, the Jury Verdicts in Case 1 and Case 2 are vacated, and this Court is now obligated to act as finder of fact and rule in the form of the findings of fact and conclusions of law set out below.

Before setting out the findings of fact and conclusions of law, however, it is necessary to address the two jury verdicts that were returned in the two trials of Case 1. This Court finds that the two verdicts were inconsistent, excessive, and against the clear weight of the evidence.

As noted above, in the first trial the jury awarded Plaintiff $286,000.00 for the denial of Within Grade Increase and only $14,000.00 for the fourteen day suspension. The Court found that Plaintiff's counsel's improper jury argument tainted the issue of the denial of Within Grade Increase. This is confirmed by the second trial where there was no improper jury argument and the jury returned a verdict in favor of Defendant on the issue of the Within Grade Increase. The second jury, however, returned a verdict of $280,000.00 for the fourteen day suspension after the first jury only awarded $14,000.00 for the

same adverse action. The two verdicts demonstrate that neither jury supported the other on either issue. The inconsistent verdicts and awards indicate that the juries sympathized with Plaintiff but that neither jury supported the other as to the merits of either cause of action.

Additionally, the Court notes that during the second trial, Plaintiff's counsel referred to an alleged reference to Plaintiff as a "slant-eyed Jap", although counsel admitted in open court that he did not have a good faith basis for making the reference. This is the only purported evidence of a derogatory racial slur that Plaintiff attempted to produce in two trials.

While it might be more popular for the Court to issue a decision awarding a sizable sum to Plaintiff as did the two Jury verdicts, although they contradicted one another (and this Court has no authority to award compensatory damages in any event); this Court is compelled in the interests of justice and fairness to render a decision based upon the evidence as it finds it, rather than upon sympathy. The Court came very close to granting summary judgment in favor of Defendant on all of Plaintiff's claims but in an abundance of caution and in an effort to afford Plaintiff every opportunity to prove her case, this Court allowed Plaintiff to proceed to trial on the claims related to her 14 day suspension and the denial of her Within Grade Increase despite finding her evidence to be "sketchy at best". Additionally, the Court allowed Plaintiff to amend her complaint to seek enforcement. of the EEOC's finding on her Case 2 claim which was favorable to her while enjoying a trial de novo on the remaining issues. Moreover, the Court refused to follow the recommendation of the Magistrate Judge to disallow the amended complaint because Plaintiff's counsel failed to file it within the allotted time.

This Court concludes that the adverse personnel actions taken against Plaintiff were not the result of any discriminatory animus but rather because of her repeated refusal or failure to follow instructions, her refusal to perform assigned tasks, her obstinate manner of dealing with her superiors, and her inability to work under the supervision of military officers. Likewise, this Court finds that Plaintiff's Case 2 claim is meritless because the Army would not have hired Plaintiff even if a negative job reference had not been made.

It is the finding of this Court that Plaintiff is not entitled to any equitable relief in Case 1 and Case 2, with the exception of reimbursement for the attorneys' fees and costs expended on her Case 2 retaliation claim to the extent the expenditures relate to enforcement of the EEOC's award of her

attorneys' fees, to which she also is entitled.

This Court's conclusions are more fully supported by the accompanying findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
I. FINDINGS OF FACT

A. Procedural History

1. This is an employment discrimination case arising out of Plaintiff's former civilian employment with Defendant at Camp H.M. Smith, Hawaii. The Court had jurisdiction over Plaintiff's claims and venue is appropriate. 42 U.S.C. §§ 2000e, et seq.

2. Plaintiff, Barbara M. Hashimoto, was employed as a Budget Analyst, GS-7, at Camp H.M. Smith from April 2, 1984 through June 2, 1986. She brings this action, generally alleging unlawful discrimination and retaliation during and after her former federal employment pursuant to § 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16.

3. Just prior to Plaintiff's removal due to a reduction in force (RIF) in June 1986, she initiated her first of two administrative complaints. In that complaint ("Case 1"), Plaintiff alleged that, because of her race and/or gender, she was suspended without pay on two occasions, denied a within grade salary increase, and eventually lost her job when her position was RIF-fed.

4. Later, while her first complaint was being investigated, Plaintiff filed her second administrative complaint ("Case 2") in which she has alleged that she suffered a negative referral by one of her former Marine Corps supervisors when she applied for a job with the Army in retaliation for filing her Case 1 administrative complaint.

5. Both administrative complaints were consolidated for investigation and were the subject of an adversarial hearing before an Administrative Judge from the Equal Employment Opportunity Commission ("EEOC").

6. The Administrative Judge found no discrimination on any of Plaintiff's claims and Defendant adopted that decision as its final agency

decision. On administrative appeal, the EEOC's Office of Review and Appeals affirmed.

7. Upon further administrative appeal, the EEOC affirmed the finding of no discrimination on all of Plaintiff's Case 1 claims, but found "mixed motives" on Plaintiff's single Case 2 claim. Specifically, the EEOC found that the negative referral by Plaintiff's former supervisor was motivated by a retaliatory animus but that Plaintiff would not have been elected for the position with the Army even absent the retaliatory referral.

8. Initially, Plaintiff sought a trial de novo on all five of her administrative claims. Prior to trial, however, Defendant obtained summary Judgment on the first suspension and the RIF claims. The Court came very close to granting summary Judgment on all of Plaintiff's claims but in an abundance of caution and in an effort to afford Plaintiff every opportunity to prove her case, this Court allowed Plaintiff to proceed to trial on the claims related to her 14 day suspension and the denial of her Within Grade Increase despite finding her evidence to be "sketchy at best". Additionally, the Court allowed Plaintiff to amend her complaint to seek "enforcement" of the EEOC's finding on her Case 2 claim which was favorable to her while enjoying a trial de novo on the remaining issues.

9. There were two jury trials of the Case 1 claims because, at the time of trial, the law of this circuit entitled Plaintiff to a jury trial. The first trial ended in a verdict for Plaintiff, but that verdict was vacated and a new trial ordered on numerous grounds.

10. A second trial was held on Case 1 and Case 2 was also tried before a jury. The Jury verdicts in Case 1 and Case 2 are vacated in light of the United States Supreme Court's ruling that the 1991 amendments to the Civil Rights Act of 1964 which provided for Jury trials and compensatory damages were not retroactive in application.

11. The Court and the parties were aware that the United States Supreme Court had heard arguments on the issue of retroactivity at the time of the second trial of Case 1. In light of the pending decision on retroactivity, and in order to avoid a third trial in the interests of judicial efficiency and economy, the parties were instructed to submit proposed findings of fact and conclusions of law.

Appendix C

B. Background

12. Plaintiff, Barbara M. Hashimoto, is a woman of Japanese ancestry.

13. Craig Hinman, Plaintiff's immediate supervisor during the period from July 1984 to April 1986, is a Caucasian male. Steven Lowery, Plaintiff's second line supervisor from September 1984 to April 1986 is also a Caucasian male.

14. Plaintiff began her employment at Camp Smith in April 1984. She was hired as a Budget Analyst, GS-561-7, within the Special Services section of the camp.

15. Initially, Plaintiff worked for Captain Cargill, a Caucasian female, with whom Plaintiff worked well.

16. In May 1984, Captain Cargill left her position as a Special Services Officer and her position was vacant until Captain Craig Hinman reported as Special Services Officer in July 1984.

17. Prior to July 1984, Hinman had not supervised civilian employees of the United States Marines, had not been a special services officer, and had not received any training in budgetary and inventory control.

C. Case 1

18. Soon after the arrival of Hinman, the Special Services section was consolidated with the Camp's Clubs System, forming a unit referred to as Morale, Welfare and Recreation (MWR). While the Special Services section and the Clubs System sections remained, administrative and clerical support personnel from both sections were consolidated within a new section referred to as the MWR Administrative Support Unit ("MASU"). This consolidation began in September 1984.

19. The head of MWR during Plaintiff's employment was Major Steven Lowery. Lowery was Hinman's immediate supervisor and Plaintiff's second level supervisor.

20. There were three billets under Hinman's direct supervision: (1) the Athletic Director, filled by Hal Nakabayashi, an Asian-American male;

(2) the Recreation Director, filled by an active duty male Marine; and (3) the Budget Assistant, filled by Plaintiff.

21. Soon after the consolidation, Plaintiff began experiencing problems in her employment. A co-worker of Plaintiff, Joan Goodman, a Caucasian female, had worked in Special Services but had left Camp Smith on vacation and sick leave from June 1984 until October 1984. During this period, Plaintiff was required to take over some of Goodman's responsibilities.

22. Goodman did not return to work until after the consolidation had begun. Goodman's billet was transferred to the MASU and she was never under Hinman's supervision.

23. Although Goodman's billet was transferred as part of the consolidation, this Court finds by a preponderance of the evidence that the tasks taken over by Plaintiff were assigned to Plaintiff by Hinman as part of the consolidation. In performing those tasks, this Court finds that Plaintiff was performing her own assigned duties, not the duties of her co-worker Goodman, whose position had been transferred to the MASU.

24. Plaintiff subsequently requested leave on the day following Thanksgiving 1984. The undisputed testimony is that Plaintiff asked for leave and it was denied. This Court finds by a preponderance of the evidence that the reason that the leave request was denied was because Hinman and Lowery believed that Plaintiff needed to complete certain of her assigned tasks in order for the consolidation to go forward as scheduled. Specifically, the Special Service accounting books had to be brought up to date in order for the books to be consolidated with the Clubs System books. This Court further finds that Hinman and Lowery believed that the tasks which Plaintiff was required to complete on the day after Thanksgiving were the responsibility of Plaintiff, not those of Joan Goodman. There is no evidence that this decision was based on Plaintiff's race and/or sex.

25. Additionally, Plaintiff's allegations that all of her leave requests were denied is rebutted by the undisputed evidence from Plaintiff's Master Leave Plan that she used 106 hours of annual leave during 1985. Def.'s Exh. 73.

26. Shortly after this incident, on November 30, 1984, Hinman revoked Plaintiff's authority to sign documents on behalf of Special Services.

Def.'s Exh. 52. The Court finds, by a preponderance of the evidence, that this act was not motivated by discrimination but was necessitated by Plaintiff's act of authorizing a single purchase which exceeded an entire quarterly budget.

27. On December 3, 1984, Plaintiff received a written instruction to check in with Hinman at the beginning of each day and check out with him at the end of each day. Def.'s Exh. 53.

28. Plaintiff claims that she was the only employee who was required to attend daily briefings. This allegation was decisively rebutted by the testimony of a number of civilian witnesses who testified that they attended such briefings with Hinman or Lowery on a daily basis, as was the practice in the military.

29. Hinman concedes that Plaintiff was the only employee who was given a written order to attend such briefings. However, this Court finds by a preponderance of the evidence that the written order was only given after repeated oral counseling failed and that other employees regularly attended such briefings without repeated instruction on the part of Hinman. Plaintiff also conceded that the written instruction came after he had left work early without informing Hinman, who had then been unable to locate her.

30. Plaintiff also contradicts her own testimony that only she was required to attend daily briefings by asserting that the male employees regularly had their briefings with Hinman in the snack bar while she alone was required to attend such briefings in Hinman's office. The testimony of Hal Nakabayashi establishes that he and the Recreation Director would attend briefings together at times and at times would attend them separately, dependent upon their job duties and schedules. Although Nakabayashi did testify that he did sometimes meet with Hinman in the Snack Bar, there is no evidence that the Recreation Director likewise did so.

31. Finally, Plaintiff testified that the twice daily briefings often lasted over an hour and required Plaintiff to stand in front of Hinman's desk while Hinman either sat in absolute silence or subjected her to insults and vulgar behavior.

32. This Court finds, by a preponderance of the evidence, that the briefings were not required of Plaintiff alone and that all employees were required to attend. This Court further finds that the fact that Hinman

occasionally held a briefing with Hal Nakabayashi in the snack bar does not constitute evidence of discrimination. Finally, not one witness could corroborate Plaintiff's allegations concerning the length and content of her briefings with Hinman and this Court finds these allegations to be incredible. Hinman testified that these meetings were of a few minutes duration.

33. This Court finds that Plaintiff's continued failure to attend daily briefings and her refusal to forward a response to an auditor's report as requested by Hinman motivated Hinman to issue a Letter of Caution on February 5, 1985. Def.'s Exh. 55. This Court finds that this letter was motivated by Hinman's honest belief that Plaintiff was derelict in obeying instructions. Indeed, this Court finds that Plaintiff's unequivocal refusal to sign to acknowledge receipt of this letter of caution and most other documents highlights the difficulty faced by Plaintiff's superiors in gaining compliance with their orders and work assignments.

34. Also on February 5, 1985, Plaintiff was given her "Basic Performance Appraisal Plan" (BPAP). Def.'s Exh. 69. This document listed the critical elements of Plaintiff's position and set forth standards on which her performance of those elements would be evaluated.

35. The testimony is undisputed that Hinman gave Plaintiff a copy of the BPAP but that Plaintiff disagreed with her assignment of duties as outlined in the document. For that reason, Plaintiff refused to sign the BPAP acknowledging that the elements and standards had been set.

36. Plaintiff maintained that her Position Description (PD) had become outdated in light of the consolidation into the MWR and the creation of the MASU. Hinman made attempts to have Plaintiff's PD rewritten but the personnel office returned the rewrite, stating that even after the revision, "the position remains classifiable as Budget Assistant, GS-561-7" Def.'s Exh. 56. There was undisputed testimony from Plaintiff's witness, Ray Mendez, the EEO counselor, that Hinman would have been entirely justified in relying on the Civilian Personnel Office's evaluation that Plaintiff's position description was valid.

37. One week after the personnel office affirmed Plaintiff's PD, Plaintiff sought assistance from an EEO counselor, Ray Mendez. Although Plaintiff went to the EEO counselor, the undisputed testimony confirms that Plaintiff did not believe she had a discrimination complaint and that Ray

Mendez had to explain to her that the EEO dealt with discrimination complaints. Pl.'s Exh. 11. Nonetheless, Mendez wrote a memorandum to Mike Long of the Civilian Personnel Office asking that Plaintiff's complaint regarding her PD be looked into. Id. Moreover, Hinman invited Plaintiff to submit a proposed revised PD and she never did.

38. Shortly thereafter, Joanne Felman of the personnel office conducted a desk audit. of Plaintiff's position. Felman testified that this involved her visiting Plaintiff's worksite and Jointly reviewing the PD, BPAP, and Plaintiff's current duties with Plaintiff. Felman testified that Plaintiff's PD and BPAP were current and accurate during this time frame and that her assignment of duties under the BPAP was appropriate.

39. The testimony of Ray Mendez on this issue lacked credibility because his assessment of the PD and Hinman's action' was based solely on the information provided by Plaintiff, which did not include critical facts such as the personnel office letter to Hinman regarding the proposed rewrite (Def.'s Exh. 56). Additionally, he acknowledged that someone else might not think that the position needed to be rewritten.

40. This Court finds, by a preponderance of the evidence, that Plaintiff's PD and BPAP accurately reflected the work that Plaintiff was required to perform and upon which her performance was evaluated. This Court further finds that Hinman's evaluation of Plaintiff based on these documents was motivated by the honestly held belief that the PD and BPAP accurately reflected Plaintiff's assigned tasks, and was not motivated by race and/or sex discrimination.

41. Plaintiff received her first "mid-cycle review" under her BPAP on May 1, 1985. Def.'s Exh. 69. Plaintiff's overall rating was marginal. At this time, Hinman noted a number of concerns with Plaintiff's performance of her duties. Specifically, out of five "critical elements," Hinman rated Plaintiff unsatisfactory in two (Elements 1 and 4) and marginal in two others (Elements 3 and 5). Plaintiff refused to sign to acknowledge receipt of this review. This evaluation of Plaintiff's performance led to another Letter of Caution on June 28, 1985. Def.'s Exh. 58. In addition to setting out the areas of deficient performance, this letter made suggestions concerning how Plaintiff could work to improve her performance. Plaintiff refused to sign to acknowledge receipt.

42. This Court finds, by a preponderance of the evidence, that this

assessment of Plaintiff's performance was based on the honestly held belief that Plaintiff's performance was indeed marginal and was not motivated by any discriminatory animus.

43. On July 30, 1985, Hinman issued his first proposal to suspend Plaintiff. Exh. 59. In this action, Hinman proposed to suspend Plaintiff for five days based on charges that she was continuing to fail to attend daily briefings, that she missed a deadline regarding some correspondence addressing a financial management inspection without letting Hinman know in advance of a problem, that she refused to prepare a letter concerning insurance coverage stating that it was not her responsibility and that she had refused to cooperate with MASU personnel regarding a backlog of clerical work. Id.

44. Plaintiff submitted a written rebuttal to these charges to Lowery, who was the deciding official. Lowery conducted an informal investigation into the situation between Plaintiff and Hinman. Based on the investigation, Lowery found that the charges were sustained, but that delay on his part caused by his investigation merited a mitigation of the penalty to an admonishment. Exh. 64-65. This Court finds that the actions of Hinman and Lowery were motivated by the honestly held belief that Plaintiff was negligent in the performance of her Job duties and not by any discriminatory animus.

45. This proposed suspension constitutes part of Plaintiff's allegations concerning clerical help. Plaintiff's billet did not include supervisory responsibilities and there were no employees subordinate to her. Although Plaintiff did receive clerical assistance from Maria Alvior for a time, testimony establishes that Alvior's position, a clerical position, was transferred to MASU along with all other clerical positions in MOOR. Plaintiff could have requisitioned clerical help through MASU, but this Court finds, by a preponderance of the evidence, that she ignored instruction to do so.

46. Plaintiff's allegations that her male counterparts had clerical help attached to them is rebutted by the testimony of other witnesses. This Court finds, by a preponderance of the evidence, that all clerical positions were transferred to MASU and that clerical help could only be requested through MASU. This Court further finds, by a preponderance of the evidence, that to the extent that the other employees under Hinman's direct supervision had assistance it was because these were supervisory positions which had enlisted personnel directly assigned as subordinates as part of the overall structure of

MOOR. These enlisted men were not assigned as clerical help. Indeed, the undisputed testimony of Hal Nakabayashi established that he did his own typing. Additionally, the undisputed evidence demonstrated that Russ Johnson, a white male who held the Clubs System position equivalent to Plaintiff's position, had no clerical help and received help through MASU. This Court holds that the evidence establishes that Plaintiff had the same access to clerical help that every one in MWR was given.

47. The next incident in Plaintiff's employment occurred on November 22, 1985. Ms. Evelyn Mau, also an Asian-American civilian employee in Special Services, testified that she had experienced problems with Plaintiff, who was responsible for delivery of paychecks to the civilian workforce in Special Services. This dispute resulted in a written complaint by Mau to Hinman, dated November 21, 1985, regarding delivery of paychecks. Def.'s Exh. 100. Thereafter, Hinman gave a written instruction to Plaintiff that she was to personally deliver paychecks to the library personnel on the day they were issued. Exh. 67.

48. According to Hinman, Plaintiff flatly refused to personally deliver checks. Although Plaintiff testified that she never refused to deliver the paychecks, she has previously admitted that she refused to deliver the paychecks. See Def.'s Exh. 77 ¶ 7.c at 6. Defendant has argued that this issue was a pretext because Hinman never subsequently corroborated that the paychecks were being delivered. However, Hinman's testimony establishes that although the paycheck problem had been resolved the reason that Plaintiff was disciplined was because of her unequivocal refusal to deliver the paychecks after the task was assigned to her by Hinman. This Court finds that this episode represents yet another example of Plaintiff's refusal to heed the instructions of her supervisors and that this blatant refusal to heed instructions was the reason for the disciplinary action. This Court finds that neither Hinman nor Lowery were motivated by any discriminatory animus.

49. At approximately the same time as the dispute concerning delivery of the paychecks, in November 1985, Plaintiff turned in a time card showing the she had worked a day when, in fact, she had been on approved leave. When this was discovered and Hinman queried Plaintiff about it, Plaintiff explained that this was so that she could have compensatory time off for overtime she had allegedly worked in August 1984---fifteen months earlier. When Hinman instructed her this was not permissible under the regulations and to change the time card to reflect her leave use, she refused.

50. Based on the timecard incident and the delivery of the paycheck incident, as well as Plaintiff's alleged continued failure to attend daily briefings, Hinman, on December 6, 1985, again proposed that Plaintiff be suspended for five days. Exh. 70. Plaintiff did not make either a written or oral reply to this proposed action and Lowery decided to impose this proposed action, suspending Plaintiff for five work days effective January 27, 1986. Def.'s Exh. 74.

51. This suspension was affirmed by the base commanding officer. Def.'s Exh. 82. Although the commanding officer stated there was insufficient evidence that Plaintiff failed to keep Hinman appraised of her whereabouts, the commanding officer found that Plaintiff's "deliberate refusal. to amend her time card and to deliver pay checks warranted a five day suspension. Id. There has been no allegation that the commanding officer's decision to affirm the suspension was motivated by any discriminatory animus.

52. This Court finds that the evidence establishes that Hinman and Lowery honestly believed that the five day suspension was warranted for the reasons set out above. A preponderance of the evidence demonstrates Plaintiff refused to follow the instructions of Hinman and was suspended accordingly. This Court finds no evidence of discrimination on the part of either Hinman or Lowery related to this adverse personnel action. Notwithstanding the fact that Hal Nakabayashi would occasionally play tennis for an hour or two during the day when he would work nights in attending athletic events in his capacity as Athletic Director, this Court finds that there was absolutely no evidence that other employees were ever allowed to claim comp time over a year after the comp time was allegedly earned. Additionally, the Court notes the testimony of Lowery that this suspension was part of an increasing level of punishment because earlier, lesser measures had not succeeded in encouraging Plaintiff to perform her assigned job duties and follow instructions from her supervisors.

53. On December 9, 1985, Plaintiff requested a meeting with the base commander through Lowery. The Court finds, by a preponderance of the evidence, that Lowery denied this meeting because Plaintiff failed to follow base procedure by submitting the request, in writing in a sealed envelope, to Lowery for submission to the base commander.

54. The final confrontation between Plaintiff and Hinman concerned Hinman's written instruction to prepare a turnover file an a letter of instruction.

Pl.'s Exh. 20. Plaintiff was given until January 1, 1986 to have this completed.

55. Plaintiff submitted a written note regarding this instruction, asking Hinman to "confirm that it is the desk top procedure that I suggested I do in Feb 1985 that you wish me to do". Id. Hinman responded by providing Plaintiff with the local instruction on desktop procedures and turnover folders. Def.'s Exh. 107.

56. Although Plaintiff contends that she already had a turnover file prepared, Plaintiff concedes that she did not provide it to Hinman. When Plaintiff failed to provide the document, he proposed that Plaintiff be suspended for fourteen days. Def.'s Exh. 75. Plaintiff responded to this proposal by stating that "Capt. Hinman was asking me, I felt, to do his Job by doing this letter of instruction, as it would have been from him". Def.'s Exh. 85.

57. Lowery decided to impose the fourteen day suspension based on his belief that Plaintiff understood what was being asked of her but that she was refusing to do as she had been told. Def.'s Exh. 87.

58. This Court finds that the evidence establishes that Plaintiff was suspended for fourteen days for failure to follow orders. This Court finds credible Lowery's testimony that even if the assigned task was trivial, Plaintiff's repeated and continuous failure to follow orders was not trivial and that a fourteen day suspension was warranted in light of the failure of previous disciplinary actions to gain Plaintiff's compliance.

59. Based on the numerous confrontations between Plaintiff and Hinman, as well as Plaintiff's continuous refusal to acknowledge that she was required to perform the tasks which Hinman assigned, Plaintiff's final performance evaluation was an overall rating of marginal. Def.'s Exh. 69, 89. The undisputed testimony of Joanne Felman established that civilian employees whose current performance evaluation is marginal are not eligible for a within grade increase (WGI). As a result, Plaintiff was denied a WGI when she became eligible in April 1986. Def.'s Exh. 89.

60. Shortly after the WGI denial, Plaintiff's position was eliminated in a RIF and her employment was terminated.[1] Plaintiff's position was not

[1] Plaintiff appealed her removal through the Merit Systems Protection Board. She allowed the MSPB decision sustaining her removal to become final, and this Court previously ruled in favor of the Defendant on this issue.

alone in being RIF-fed. Among the others whose positions were involved in the RIF included Guy Guessford, a white male, and Russ Johnson, a white male who held the equivalent position to Plaintiff in the Clubs System. This Court finds, by a preponderance of the evidence, that the RIF was not personal to Plaintiff because another position exactly like Plaintiff's was involved in the RIF as well, even though it was held by a white male.

61. Plaintiff argued that her RIF was discriminatory because even though Russ Johnson's position was RIF-fed as well, Johnson was given a temporary position as acting head of the Clubs System. This Court finds this argument to be lacking because the undisputed testimony established that Plaintiff was given the opportunity to apply for the position and did not apply. Indeed, the undisputed evidence established that Johnson's position was only temporary pending the appointment of a permanent director and Johnson refused to apply for the permanent position because Lowery insisted on opening the permanent position to applications from other potential applicants, including Plaintiff. Accordingly, this Court finds that Plaintiff's RIF was not discriminatory as evidenced by the contemporaneous RIF of similarly-situated white males and also by the undisputed fact that Plaintiff could have applied for a different position and refused to do so.

62. Both Hinman and Lowery presented testimony that they had first or second line supervisory responsibility over a number of Asian-American and/or females. Each testified that Plaintiff was the only Asian-American female who was subject to discipline by them. Although Lowery testified that he disciplined a white female, both Hinman and Lowery testified that the rest of those disciplined by them were males.

63. Additionally, other than Plaintiff's bald allegations, not one witness testified that they had observed Hinman or Lowery discriminate against anyone on the basis of race and/or sex. This included the testimony of white women, Asian-American women and Asian-American men. The evidence established that Hinman had never before supervised civilians and Plaintiff's witnesses criticized Hinman not for discrimination, but for treating civilians like Marines. This is illustrated by the testimony of Guy Guessford.

64. Plaintiff did produce the testimony of Deborah Okamoto an Asian-American female, who felt that she was sexually harassed by Hinman because he asked her out to lunch three times and made a Joke about a Super Bowl ring. However, Okamoto stated that the treatment that she was subjected

to was not encountered by the enlisted personnel, other officers there, or other females on the base. "So it was assumed that it had to do with the fact that it was because I was civilian." Okamoto Dep. at 27-28. She conceded that she was never adversely affected by refusing to go to lunch with Hinman and that when she mentioned the lunch invitations to her supervisor, Hinman ceased asking her to lunch.

65. Additionally, this Court finds that the undisputed evidence established that Hinman is married to an Asian-American woman who was described as being strong willed. The Court finds that this fact evidences the fallacy of Plaintiff's theory that Hinman was biased against Asian-American women and expected them to be meek and subservient.

66. Finally, on the issue of credibility, witnesses testified that Plaintiff's character for truthfulness was lacking. On the other hand, witnesses uniformly testified to the fact that the character of Hinman and Lowery for truthfulness was above reproach. The attempts of Plaintiff's counsel to impeach the testimony of various witnesses with prior testimony from the many different proceedings over the last number of years only served to illustrate the difficulty witnesses faced in testifying to events of so many years ago. Further, much was made of the failure of Lowery to correct a mistake in an affidavit. This Court finds Lowery's testimony that it was an honest oversight to be credible and to be supported by the failure of Plaintiff's counsel to correctly count the corrections in the affidavit while going over the affidavit in minute detail during cross-examination.

67. In sum, this Court finds, by a preponderance of the evidence, that all of the disciplinary actions taken by Hinman and Lowery while Plaintiff was under their supervision to have been motivated by the honestly held belief, even if wrong or unfair, that Plaintiff was insubordinate and that the disciplinary actions were not motivated in any respect by a discriminatory animus.

D. Case 2 - Negative Job Reference

68. In July 1988, Plaintiff applied for a temporary position as a budget clerk with the Army at Fort Shafter. The selecting official, Mr. Richard Satake, arranged for an interview with Plaintiff. Before this interview, however, Satake contacted Major Lowery for an employment reference regarding Plaintiff.

69. Lowery informed Satake of Plaintiff's employment history to

include the numerous attempts at counseling and her suspensions. Although he did include mention of her EEO complaint, the clear emphasis of Major Lowery's comments concerned Plaintiff's unwillingness to follow instructions or heed counseling. Def.'s Exh. 106.

70. After learning of Plaintiff's suspensions, Satake refused to consider Plaintiff for employment. Satake expressly denies having relied on the fact that Plaintiff filed an EEO complaint during his consideration of her application.

71. This Court finds that testimony of Plaintiff's sister that Satake asked why she had not informed him about Plaintiff's EEO activity to be lacking in credibility in light of the fact that (1) she refused to acknowledge on the witness stand that she had been called as Plaintiff's witness in previous administrative hearings despite the clear record of the previous proceeding; (2) given the fact that she had previously filed a discrimination suit against the officer who was sent to ask her questions about Plaintiff's case as part of the discovery process; and (3) her bias in favor of her sister evident from her demeanor.

72. As noted at the outset, Plaintiff's two administrative EEO complaints were subject to extensive litigation. In the final administrative decision on these claims, the EEOC found no discrimination during Plaintiff's employment at Camp Smith. With respect to the Army job, however, the EEOC found that Plaintiff was subject to retaliation by virtue of Lowery's comments, but it also found that Plaintiff would not have been selected for the Army position.

73. Plaintiff has been allowed to enforce. that portion of the EEOC decision favorable to her---that Lowery's negative Job reference was motivated by a retaliatory animus---while relitigating de novo the remaining issue of whether the Army would have hired her.

74. Although this Court finds that Lowery's negative job reference was motivated by the belief that Plaintiff was incompetent and insubordinate and not by a retaliatory animus, this Court will allow Plaintiff to enforce the EEOC's determination that the recommendation was motivated by a retaliatory animus. Lowery should not have referred to Plaintiff's EEO claim. In any event, this Court finds that the Army would not have hired Plaintiff even absent the retaliatory reference to Plaintiff's EEO activities in light of her

marginal performance review and extensive disciplinary record.

75. Therefore, this Court finds that Plaintiff is entitled solely to an award of attorneys' fees and costs related to her Case 2 retaliation claim, in addition to the attorneys' fees awarded to her by the EEOC. This award is limited to that portion of fees and costs necessary to pursue enforcement of her retaliation claim and is not to include any amount related to Plaintiff's de novo relitigation of the issue of whether the Army would have hired her in the absence of the retaliatory reference. Plaintiff is not entitled to any other equitable relief related to Case 2. Additionally, Plaintiff is not entitled to any attorneys' fees or costs or other equitable relief related to the litigation of Case 1.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over Plaintiff's Case 1 and Case 2 claims pursuant to 42 U.S.C. SS 2000e et seq.

A. Case 1

2. The Supreme Court has established a clear framework for the evaluation of Title VII claims:

> In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the initial burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a mere pretext for discrimination. Id., at 804. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). Accord St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2753 (1993); Odima v. Westin Tucson Hotel Co., 991 F.2d 595, 599 (9th Cir. 1993).

3. The two Case 1 issues which remain for adjudication are whether

Plaintiff suffered unlawful discrimination when she was suspended for fourteen days and when she was denied a within grade increase. On each of these issues, Plaintiff has established a prima facie case in that she was a member of one or more protected classes, she suffered some form of adverse employment decision, and others who were not in her protected classes were not subject to the adverse employment decision.

4. A defendant need only articulate---not prove---a legitimate nondiscriminatory reason for the personnel action being challenged. The employer's burden is satisfied if he simply 'explains what he has done'..." Burdine, 450 U.S. at 256 (quoting Board of Trustees v. Sweeney, 439 U.S. at 24, 25 n.2 (1978)). In this case, Defendant clearly articulated legitimate nondiscriminatory reasons for the actions taken: Plaintiff was suspended for fourteen days because she did not produce a turnover folder (in any format) as she had been instructed to do and she was denied a WGI because her performance had been rated as marginal.

5. At this stage in the analysis of a Title VII case, the burden on Plaintiff merges with her " ' ultimate burden of persuading the court that [she had] been the victim of intentional discrimination.'" Odima, supra, (quoting Burdine, 450 U.S. at 256. Plaintiff could have carried this burden " ' either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' " Id. Plaintiff did not carry this burden.

6. Plaintiff expended the vast majority of her energies attempting to show that Hinman and, to a lesser extent, Lowery were not good supervisors of civilian employees. For example, Plaintiff's greatest apparent complaint concerning the turnover file order was the wording of Hinman's order. Hinman is not on trial for issuing poorly worded instructions, however, and Title VII does not offer relief for poor supervision or unfair employment in general.

7. The Ninth Circuit has only recently cautioned trial courts:

> The district courts must not substitute its own Judgment about whether the employment decisions tat issue] were wise, or even fair, for that of the employer. . . . [T]he district court's conclusions must be based on factual findings grounded in the record, and not on vague, impressionistic notions that [defendant] must have discriminated against [plaintiff] because [she] is deserving of better [treatment].

Odima, 991 F.2d at 602. Plaintiff's evidence demonstrates, at most, that Hinman and Lowery may not have been accustomed to the differences in managing civilian and military personnel and this Court finds, by a preponderance of the evidence, that management decisions of Hinman and Lowery were not the product of any unlawful discrimination.

8. Plaintiff's other allegations that she was treated differently than others who were Caucasian and/or male were all decisively rebutted by evidence or are insufficiently indicative of any discriminatory animus. For example, Plaintiff's allegation that she was the only employee who was required to attend daily briefings was rebutted by the testimony of a number of witnesses; and her allegation that she never received annual leave while other white female employees did was rebutted by Plaintiff's 1985 master leave plan.

9. The Supreme Court recently made clear that the central issue in a Title VII case such as this is whether the plaintiff suffered the challenged personnel action because of the characteristic protected by the statute. St. Mary's Honor Center, 113 S.Ct. at 2747. On this point, Plaintiff has offered only her conclusory allegation that Hinman and Lowery were motivated by a discriminatory animus. There is simply no evidence which backs up these allegations.

10. Because Plaintiff has failed to carry her burden as to any of the Case 1 claims she has presented, judgment is hereby ordered for Defendant.

B. Case 2

11. A federal employee may seek enforcement of a favorable EEOC order in district court. See Moore v. Devine, 780 F.2d 1559, 1562-63 (11th Cir. 1986); Houseton v. Ninmo, 670 F.2d 1375, 1378 (9th Cir. 1982). A district court may enforce such an order without requiring de novo review of the merits. Id. Finally, if the court finds that the relief granted by the EEOC is insufficient, it may grant additional remedies as it deems appropriate. See Pecker v. Heckler, 801 F.2d 709 (4th Cir.1986).

12. In the event that only a portion of the EEOC's findings are favorable to a plaintiff, the plaintiff may accept that portion of the EEOC's finding that is favorable while relitigating de novo that portion that is unfavorable. See Morris v. Rice, 985 F.2d 143 (4th Cir. 1993); Haskins v.

Department of Army, 808 F.2d 1192 (6th Cir. 1987); Pecker v. Heckler, 801 F.2d 709 (4th Cir. 1986). But see, Cocciardi v. Russo, 721 F.Supp. 735 (E.D.Pa. 1989) (discussing fragmentary trial de novo). Accordingly, Plaintiff is able to accept as binding the EEOC's finding of retaliatory animus on the part of Major Lowery while being allowed to relitigate the damages issue related to whether Plaintiff would have been offered a job with the Army in the absence of the retaliatory employment reference.

13. A negative job reference is an actionable negative personnel action under Title VII. See Rutherford v. American Bank of Commerce, 565 F.2d 1162 (lOth Cir. 1977); Pantchenko v. C.B. Dolge Co., Inc., 581 F.2d 1052 (2nd Cir. 1978); Shehadeh v. Chesapeake & Potomac Tel. Co., 595 F.2d 711 (D.C. Cir. 1978). The Ninth Circuit has not explicitly so held, but has in dicta approved Title VII actions for negative employment references. See London v. Cooper & Lybrand, 644 F.2d m811, 817 (9th Cir. 1981) (citing Shehadeh, Rutherford, and Pantchenko and allowing a former employee to sue under § 1981 for adverse job reference).

14. This Court, having accepted the finding of retaliatory animus by the EEOC, is asked to determine whether the Army would have hired Plaintiff in the absence of the negative job reference. The undisputed testimony of Richard Satake established that he was not motivated by the retaliatory reference and would not have hired Plaintiff in light of her substantial disciplinary record and marginal performance rating. Plaintiff has failed to offer any credible evidence that Satake's decision was motivated, in whole or in part, by Lowery's retaliatory job reference.

15. Because Plaintiff has established that Lowery's job reference was motivated by an unlawful retaliatory animus, Plaintiff is entitled to an award of attorneys' fees and costs related to her enforcement action, in addition to her attorneys' fees awarded by the EEOC, but not for her counsel's efforts to establish that the Army would have hired her in the absence of the retaliation by Lowery. See Smith v. Secretary of the Navy, 659 F.2d 1113 (D.C.Cir. 1981). This is the extent of the relief to which Plaintiff is entitled.

CONCLUSION

16. Any finding of fact which may be deemed, in whole or in part, more properly a conclusion of law shall be deemed as such, and any conclusion of law which may be deemed, in whole or in part, more properly a finding of

fact shall be deemed as such. All findings by the Court are based upon a preponderance of the evidence.

17. The Jury Verdicts in Case 1 and Case 2 are vacated.

18. This Court orders that judgment be entered for Defendant on Plaintiff's Case 1 claims.

19. This Court further orders that Plaintiff is entitled to reimbursement for the attorneys' fees and costs expended on her Case 2 retaliation claims to the extent that the expenditures relate to enforcement of EEOC findings awarding her attorneys' fees, to which she also is entitled. This is the only equitable relief to which Plaintiff is entitled. The determination of such fees and costs is designated to a Magistrate Judge for a report and recommendation. IT IS SO ORDERED.

DATED: Honolulu, Hawaii, MAY 25, 1994

s/ Alan C. Kay
Chief United States District Judge

HASHIMOTO V. DALTON. SECRETARY OF THE NAVY: CIV. NO. 91-00081 ACK; ORDER VACATING JURY VERDICTS AND DECISION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appendix D

JUDGEMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JULY 3, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

DEC 01, 1992

at 2 o'clock and 0 min. S/W.CHIN M.
WALTER A. V. H. CHINN, CLER

NO. 95-15827
CT/AG#: CV-91-00081-ACK

BARBARA MUTSUKO HASHIMOTO
Plaintiff - Appellee

v.

JOHN DALTON, Secretary of the Navy
Defendant - Appellant

NO. 95-159600
CT/AG#: CV-91-00081-ACK

BARBARA MUTSUKO HASHIMOTO
Plaintiff - Appellee

v.

JOHN DALTON, Secretary of the Navy
Defendant - Appellant

APPEAL FROM the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgement of the said District Court in this cause be, and hereby is AFFIRMED

Filed and entered July 3, 1997

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

SEP 16, 1997

by: s/ "illegible"
Deputy Clerk

Appendix D

FOR PUBLICATION

UNITED STATES COURT
FOR THE NINTH CIRCUIT

BARBARA MATSUKO HASHIMOTO,
Plaintiff-Appellee
Cross-Appellant,

JOHN DALTON, Secretary of the Navy,
Defendant-Appellant
Cross-Appellee

Nos. 95-15827
95-15960
D.C. No.
CV-91-00081-ACK
OPINION

Appeals from the United States District Court
for the District of Hawaii
Alan C. Kay. District Judge, Presiding

Argued and Submitted
March 14, 1997—San Francisco, California

Filed July 3, 1997

Before: Otto R. Skopil, Jr., William C. Canby, Jr. and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Skopil

SUMMARY

Labor & Employment/Employment Discrimination

The court of appeals affirmed a judgment of the district court. The court held that under Title VII, a former employer's retaliatory negative job reference for a discharged employee may serve as an "adverse personnel action" even if it does not affect the prospective employer's hiring decision.

While appellant Barbara Hashimoto worked for the Navy, her immediate and second-line supervisors were Captain Craig Hinman and Major Steven Lowery. Hashimoto contacted an Equal Employment Opportunity (EEO) counselor, complaining that she was being evaluated for work that

was not her responsibility to perform. Although Hashimoto did not believe that Title VII discrimination was involved, the EEO counselor notified the personnel office that there was a potential EEO complaint.

Just prior to her discharge due to a reduction in force (RIF), Hashimoto brought an administrative complaint (Case 1) alleging that Hinman and Lowery had subjected her to adverse employment action due to her race and gender and because she had met with the EEO counselor: (1) a five-day suspension; (2) a 14 day suspension; (3) denial of a within-grade salary increase (WGI); and (4) discharge by RIF.

While her first administrative complaint was pending, Hashimoto filed a second (Case 2), alleging that when she applied for a job with the Army. .she received a negative job reference from Lowery in retaliation for Case 1.

The Equal Employment Opportunity Commission (EEOC) rejected all of Hashimoto's Case I claims. However, on the Case 2 retaliation claim, the EEOC found that Lowery's negative reference had been animated by retaliatory animus, but that Hashimoto would not have been hired in any event. The EEOC ordered the Navy to cease and desist its practice of notifying prospective employers of its employees' or former employees' participation in protected EEO activity; to remove from Hashimoto's personnel file Lowery's negative reference; to give Lowery and all supervisory staff EEO training; and to post copies of an EEO notice. The EEOC also ordered the Navy to pay Hashimoto's attorneys' fees. Hashimoto sought a trial de novo on all her claims.

The district court dismissed Hashimoto's claims based on the 5-day suspension and the RIF. The court found that Hashimoto had failed to exhaust administrative remedies because she did not alert an EEO counselor within 30 days of the allegedly discriminatory suspension, and had not pursued the RIF claim before the Merit Systems Protection Board (MSPB).

As to her retaliation claims based on the meeting with the EEO counselor. the court granted summary judgment for the government on the ground that Hashimoto had failed to show that the government retaliated against her for engaging in protected activity." The court reasoned that Hashimoto did not reasonably believe that the Navy had engaged in unlawful employment practices because she had sought only to have her personal

problem (outdated job description) remedied.

On the remaining Case 2 retaliation claims (14-day suspension, denial of WGI. negative job reference). the case proceeded to trial. Successive juries awarded Hashimoto damages. but the district court vacated both verdicts. At the court's direction. the parties submitted proposed findings of facts and conclusions of law.

The district court concluded that on Hashimoto's Case 1 discrimination claims. the adverse personnel actions were not based on discriminatory animus, but on various deficiencies in her performance the government cited as legitimate reasons for her discharge. With respect to the Case 2 retaliation claim, the court determined that it was unsupported because the Army would not have hired Hashimoto even if Lowery had not disseminated the negative job reference.

However, the district court enforced the EEOC's award of attorneys" fees, and awarded additional fees on the Case 2
retaliation claims to the extent that they related to the EEOC's award of fees. Both sides appealed.

The government contended that the attorneys" fee award was unjustified because a negative employment reference is not an actionable adverse personnel action under Title VII. Additionally, the government contended that because Lowery's negative job reference did not result in employment-related harm, there was no Title Vll violation, i.e., 'no harm, no foul." In any event. the government asserted, no award was permissible because Hashimoto was not a prevailing party."

Hashimoto asserted that the dismissal of the Case I suspension and RIF termination was improper because she alleged a pattern of discriminatory acts sufficient to support a continuing violation" theory. In Hashimoto's view, her meeting with the EEO counselor was protected activity." As to the remaining Case I claims, Hashimoto contended that the district court erred in crediting testimony by Hinman and Lowery because they made misstatements of fact during the two trials and in documents admitted into evidence.

[1] Dissemination of adverse employment references can constitute a violation of Title Vll if motivated by discriminatory intent. It was beside the point that Lowery's negative reference was not the reason Hashimoto did not

get the job with the Army. Lowery's dissemination of the negative reference was an actionable employment decision.

[2] The government could have avoided Title VII liability if it had established that Lowery would have given Hashimoto the negative reference even if she had not filed the EEOC complaint. The government failed to do so.

[3] Traditionally in cases alleging retaliation, the conduct takes the form of discharge, demotion, failure to promote, or similar actions that inflict tangible employment-related harm on the employee. A retaliatory negative job reference does not
inflict tangible employment harm in the traditional sense. It requires a prospective employer's subsequent adverse action (failure to hire) in reliance on the reference to create demonstrable employment harm.

[4] A plaintiff may seek relief for retaliatory actions taken after her employment ends if the alleged discrimination is related to or arises out of the employment relationship. Title VII does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer, or demotion.

[5] Lowery's dissemination of the adverse job reference violated Title VII because it was a personnel action motivated by retaliatory animus. That it fumed out to be inconsequential went to the issue of damages. not liability.

[6] Actions taken in retaliation for the exercise of Title VII rights can have a deleterious effect on the exercise of those rights by others. Although this harm was not suffered by Hashimoto because she was no longer employed by the Navy, the chilling effect that Lowery's conduct might have had on employees under his supervision counseled against accepting the government's narrow conception of what constitutes a violation of Title VII.

[7] A litigant need not prevail on every issue, or even on the central issues in the case. to be considered the prevailing party. It is enough that she succeeds on any significant claim affording some of the relief sought. If the plaintiff is only partially successful and achieves only some of the benefit sought by the litigation, she is still considered the prevailing party.

[8] To remedy Lowery's retaliatory actions. 19] the EEOC did more

than merely determine that Hashimoto had been the victim of a retaliatory negative character reference. It ordered a panoply of remedial measures, at least .some of which were personal to Hashimoto. The EEOC's order effected a material alteration in the legal relationship between the plaintiff and the defendant sufficient to confer prevailing party status on Hashimoto.

[10] A plaintiff who achieves a significant nonmonetary result not only for himself but for the community in general attains more than a ~technical" victory. Hashimoto obtained relief that not only benefited her personally, but served to assist persons like her in that the EEOC's remedial measures prevented others from being subjected to retaliatory actions by the Navy.

[11] The continuing violations doctrine did not save Hashimoto's claim relating to her 5-day suspension. To establish a continuing violation. one or more of the allegedly discriminatory acts must fall within the limitations period. Hashimoto failed to show that the Navy committed any discriminatory acts between the effective date of her 5-day suspension and the expiration of the 30-day limitations period. [12] Hashimoto also failed to establish how the existence of a continuing violation would have cured the jurisdictional defect in her claim relating to the RIF. A district court simply does not have jurisdiction over discrimination claims that were not raised before the MSPB.

[13] To succeed on a retaliation claim, the plaintiff must demonstrate (1) that she was engaging in protected activity; (2) that she suffered an adverse employment decision; and (3) that there was a causal link between her activity and the employment decision. The district court determined that Hashimoto satisfied the last two elements, but failed to establish the first.

[14] Hashimoto did more than merely complain to a superior. She contacted an EEO counselor about her concerns. Even assuming that her concerns were "personal," this contact with the EEO counselor was itself protected activity.

[15] An employer can violate the anti-retaliation provisions of Title VII in either of two ways: (1) if the adverse action occurs because of the employee's opposition to conduct made an unlawful employment practice, or (2) if it is in retaliation for the employee's participation in the machinery set up by Title VII to enforce its provisions. Hashimoto's visit with the EEO counselor constituted participation in the machinery set up by Title VII. As

such. it was protected activity. The district court erred in determining that Hashimoto failed to establish a prima facie case of retaliation.

[16] Hashimoto made no attempt to refute the government's legitimate explanation for its actions. She failed to carry her burden of establishing a ~able issue-of fact on the question of whether the government retaliated against her for meeting with the EEO counselor. The district court's grant of summary judgment was thus appropriate.

[17] On Hashimoto's Case 1 claims, the district court credited the testimony of Hinman and Lowery. This was a credibility determination. The district court s credibility determinations are entitled to special deference. [18] The alleged misstatements provided no reason to disturb the district court's decision to credit Hinman and Lowery. [19] The district court did not err in granting judgment in the government's favor on the remaining Case 1 claims.

COUNSEL

Clayton C. Ikei, Honolulu, Hawaii, for the plaintiff-appellee-cross-appellant.

Theodore G. Meeker, Assistant United States Attorney, Honolulu, Hawaii; Major Raymond T. Lee, III. United States Marine Corps, Santa Ana, California, for the defendant-appellant-cross-appellee.

OPINION

SKOPIL, Circuit Judge:

In this Title VII action, an Asian-American woman alleges incidents of disparate treatment and retaliation by her former employer, the Department of the Navy. The district court ruled in favor of the Navy on all but one of plaintiff's claims. On the remaining claim, the court concluded that the Navy retaliated against the plaintiff for filing an administrative complaint with the Equal Employment Opportunity Commission (~.EEOC"). The court awarded attorney's fees.

The Navy appeals the award of fees. Plaintiff' cross-appeals the court's rejection of her other claims. We have carefully reviewed the record, and conclude that no reversible error occurred. Accordingly, we affirm.

Appendix D

I. Background

Plaintiff Barbara Hashimoto worked for the Navy as a Budget Analyst from April 1984 through June 1986. For most of this time, Captain Craig Hinman was her immediate supervisor and Major Steven Lowery was her second line supervisor —both white males. The relationship between Hashimoto and her supervisors was quite turbulent. Just prior to her termination due to a reduction in force (''RIF'), she initiated an administrative complaint. In that complaint (~-Case 1"), Hashimoto alleged that Hinman and Lowery subjected her to four adverse employment actions because of her race and gender and because she met with an Equal Employment Opportunity (.EEO-) counselor (1) a 5-day suspension effective January 27, 1986; (2) a 14-day suspension effective April 10, 1986; (3) denial of a within grade salary increase ("WGI") on April 13, 1986; and (4) termination by RIF on June 2, 1986.

While her first complaint was pending, Hashimoto filed a second administrative complaint (~.Case 2") in which she alleged that. when she applied for a job with the Army in 1988, she received a negative job reference from Lowery in retaliation for filing her Case I administrative complaint. The two complaints were consolidated and eventually reached the EEOC, which rejected all of Hashimoto's Case 1 claims. On the Case 2 retaliation claim. however, the EEOC found that the negative reference was motivated by retaliatory animus but that Hashimoto would not have been hired by the Army in any event. The EEOC ordered the Navy to undertake certain measures to remedy the retaliatory conduct and to pay Hashimoto's attorney's fees.

Hashimoto sought a trial de novo on all five of her administrative claims. Prior to trial, however, the district court dismissed the 5-day suspension and RIF claims on procedural grounds. Further, the district court granted the Navy's motion for summary judgment on the retaliation portion of her Case I claims. The court also allowed Hashimoto to seek enforcement of the EEOC's finding of retaliation on her Case 2 claim, while receiving a trial de novo on the remaining issues. Thus. the only issues for trial were Hashimoto's discrimination claims relating to her 1 ~day suspension and denial of the WGI, and her claim that the Army would have hired her in the absence of the negative job reference.

There were two jury trials on Hashimoto's claims. The first trial ended in a $300.000 verdict for Hashimoto, but that verdict was vacated by the district court and a new trial was ordered. A second trial resulted in a $280,000

verdict for Hashimoto. That verdict. however, was vacated by the district court in light of Landgraf v. USI Film Products, 51 1 U.S. 244 (1994), which held that the 1991 amendments to the Civil Rights Act of 1964, providing for jury trials and compensatory damages, were not retroactive in application. Hashimoto does not contest the district court's decisions to vacate the jury verdicts.

To avoid a third trial, and in the interests of judicial efficiency and economy," the parties were instructed to submit proposed findings of fact and conclusions of law based on the evidence admitted in the second trial. The district court thereafter issued its findings of fact and conclusions of law. Hashimoto vs. Dalton, 870 F. Supp. 1544 (D. Haw. 1994). The court concluded on the Case 1 discrimination claims that "the adverse personnel actions taken against Plaintiff were not the result of any discriminatory animus but rather because of her repeated refusal] or failure to follow instructions, her refusal to perform assigned tasks, her obstinate manner of dealing with her superiors, and her inability to word; under the supervision of military officers." Id. at 1547. Further, the court concluded that Hashimoto's Case 2 retaliation claim was meritless because the Army would not have hired her even if a negative job reference had not been disseminated. Id Nevertheless, the court specifically enforced the EEOC's award of attorney's fees, and awarded additional attorney's fees and costs on the Case 2 retaliation claim to the extent that the expenditures related to enforcement of the EEOC's award of attorney's fees.

The government appeals the district court's order awarding Hashimoto attorney's fees and costs. Hashimoto cross-appeals the district court's orders (1) dismissing on procedural grounds her claims relating to her 5-day suspension and her termination pursuant to a RIF; (2) granting summary judgment in favor of the government in her Case I retaliation claim; and (3) granting judgment in favor of the government on her remaining Case I disparate impact claims.

IL Attorney's Fees

A. The Title VII Violation

The district court concluded that "[a] negative job reference is an actionable negative personnel action under Title VII." Hashimoto. 870 F. Supp. at 1557. The court also accepted the EEOC's findings that Lowery's dissemination of a negative job reference to the Army was motivated by

unlawful retaliatory animus. On this basis, the district court concluded that Hashimoto was entitled to the attorney's fees awarded by the EEOC.

The government contends that the district court's enforcement of the EEOC's attorney's fee award is unsupportable because Hashimoto failed to establish a violation of Title VII. In the government's view, a negative employment reference is not an independently actionable adverse ..personnel action." Instead. the only personnel action" involved here was the Army's decision not to hire Hashimoto. Because, as the district court found. the negative reference did not cause this adverse personnel action" by the Army, the government posits that Hashimoto failed to establish a Title Vll violation.

[1] The government's lack; of causation argument must fail. ..There is little question that the dissemination of adverse employment references can constitute a violation of Title VII if motivated by discriminatory intent.- London v. Coopers & Lybrand. 644 F.2d 811, 817 (9th Cir. 1981). Thus, it is beside the point that Lowery's negative job reference was not the reason Hashimoto did not get the job with the Army. Lowery's dissemination of the negative job reference is an actionable employment decision. Both the EEOC and the district court found that Lowery gave Hashimoto the negative reference in retaliation for her EEOC activities, and the government does not challenge that finding on appeal. Thus, the requisite causal connection is established.

[2] The government's initial misstep leads it to the erroneous conclusion that Price Waterhouse v. Hopkins. 490 U.S. 228 (1989), supports its position. On the basis of statements made in the various opinions of a divided Supreme Court, the government asserts that there can be no Title VII violation here because the Army did not rely upon Lowery's negative reference in its decision not to hire Hashimoto. The plurality opinion in Price Waterhouse concludes that ..an employer shall not be liable if it can prove that, even if it had not taken [an illegitimate factor] into account, it would have come to the same decision regarding a particular person." 490 U.S. at 242. Once it is understood, however, that it is the reference itself which is the actionable employment decision, the plurality's statement fully supports the district court's decision. Properly applied to this case, that statement merely means that the government could have avoided Title VII liability if it had established that Lowery would have given Hashimoto the negative employment reference even if she had not filed a complaint with the EEOC. This, according to both the EEOC and the district court, the government failed to do. Thus, the district court did not flout the teachings of Price Waterhouse in holding that Lowery's

conduct violated Title VII.

The other cases upon which the government relies do not support the government's position for the same reason. Those cases would be apposite only if the Army's decision not to hire Hashimoto was the relevant employment decision. As previously established, however, the adverse ~ personnel action" at issue here is Lowery's dissemination of the negative reference itself. Thus, those cases do not apply. See, e.g., Ruggles v. California Polytechnic State Univ., 797 F.2d 782 (9th Cir. 1986) (relevant employment action was failure to hire); Visser v. Packer Engineering Assoc., Inc., 924 F.2d 655 (7th Cir. 1991) (en bane) (discharge); Cesaro v. Lakeside Community Sch. Dist., 953 F.2d 252 (6th Cir.) (failure to hire); Wilson v. Stroh Companies, Inc., 952 F.2d 942 (6th Cir. 1992) (discharge); Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990) (discharge).

13] In a closely related argument, the government further asserts that because Lowery's reference did not inflict any employment-related harm upon Hashimoto, there can be no Title VII violation. This presents a thornier question. Traditionally, in cases alleging retaliation, the retaliatory conduct takes the form of discharge, demotion, failure to promote, or similar actions that clearly inflict tangible, employment-related harm upon the employee. A retaliatory negative job reference, by contrast. does not itself inflict tangible employment harm in the traditional sense. It requires a prospective employer's subsequent. adverse action (failure to hire) in reliance on that reference to create the demonstrable employment harm. The government correctly points out that in every published case-involving a negative reference, the reference allegedly resulted in a failure to hire by the prospective employer, The government contends that, because such an injury is lacking here, no Title VII liability attached.

[4] We reject the government's .-no harm, no foul" approach. A plaintiff' may seek relief for retaliatory actions taken after her employment ends if "the alleged discrimination is related to or arises out of the employment relationship." Passer v. American Chemical Soc., 935 F.2d 322, 330 (D.C. Cir. 1991) (collecting cases). Title Vll .'does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer, or demotion.- Id. at 331.'

Moreover. we have squarely rejected a similar no harm, no foul" argument in the Title VII context. In EEOC v. Hacienda Hotel. 881 F.2d 1504

(9th Cir, 1989), the EEOC initiated an employment discrimination action alleging that the employer had violated Title VII by terminating three pregnant employees. The employer argued that it should not be held liable because the employees suffered no "damage" as a result of the terminations since two of the employees were rehired following their pregnancies without loss of seniority or other benefits, and the third employee would not have been rehired in any event because of her poor work performance, Hacienda Hotel, 881 F.2d at 1511, We vigorously rejected the employer's argument:

Although Passer was an ADEA case. the court specifically concluded that the ADEA anti-retaliation provision is "parallel to the anti-retaliation provision contained in Title Vll. and that "cases interpreting the latter provision are frequently relied upon in interpreting the former." 935 F.2d at 330.

[T]he Hacienda's view of its employees' pregnancy discrimination claims is no harm, no foul." Beyond the cavalier attitude such statements convey, appellant's argument evidences an almost total misapprehension of the purposes and operation of federal employment discrimination law.... Appellant is confusing the liability determination with the relief phase. Even if no employee suffered a tangible loss" of an ..economic nature," i.e.., a loss of seniority or wages or other monetarily quantifiable employment benefits, appellant's implementation of a policy or practice under which pregnant employees were treated differently from other temporarily-disabled employees with similar capacity for work; would still be a violation of both the letter and spirit of Title VII's prohibition against pregnancy discrimination, Id at 1511-12,

[51 Just as in Hacienda Hotel, the government's argument in this case fails to recognize the distinction between a violation and the availability of remedies, Lowery's dissemination of the adverse job reference violated Title VII because it was a "personnel action" motivated by retaliatory animus, That this unlawful personnel action turned out to be inconsequential goes to the issue of damages, not liability. See, e.g., Smith v. Secretary of Navy, 659 F.2d 1113, 1120 (D.C. Cir. 1981) ("[T]he questions of statutory violation and appropriate statutory remedy are conceptually distinct. An illegal act of discrimination—whether based on race or some other factor such as a motive of reprisal—is a wrong in itself under Title VII, regardless of whether that wrong would warrant an award of [remedies].") (citation omitted); Sparrow" v. Piedmont Health Sys. Agency, Inc., 593 F. Supp. 1107, 1119 (M.D.N.C. 1984) (agency's retaliatory refusal to provide a letter of recommendation

violated Title VII, but plaintiff was not entitled to a remedy because he failed to demonstrate any harm resulting from the agency's action).

[6] Further, as in Hacienda Hotel, adoption of the government's position would undermine both the letter and the spins of Title VII's prohibition against actions in retaliation for EEO activities. We have recognized that actions taken in retaliation for the exercise of Title VII rights can have a deleterious effect on the exercise of these rights by others." Garcia v. Lawn, 805 F.2d 1400, 1405 (9th Cir. 1986). Although this particular harm was not suffered by Hashimoto in the present case because she was no longer employed by the Navy, the chilling effect which Lowery's retaliatory conduct might have on the remaining employees under his supervision does counsel against accepting the government's narrow conception of what constitutes a violation of Title VII. Accordingly, we conclude that the retaliatory dissemination of a negative employment reference violates Title VII, even if the negative reference does not affect the prospective employer's decision not to hire the victim of the discriminatory action.

B. The Fee Award

The district court awarded Hashimoto $20,565.19 in attorney's fees for her counsel's successful prosecution of the retaliation claim before the EEOC. The court also awarded Hashimoto an additional $10,982.50 in attorney's fees incurred in her action to enforce that award in the district court The court expressly declined to award attorney's fees for her counsel's efforts to establish that the Army would have hired her in the absence of the retaliation by Lowery. Hashimoto, 870 F. Supp. at 1557. The government argues that the district court failed to review the legal propriety of the attorney's fees award ordered by the EEOC. In the government's view, the EEOC's award of attorney's fees was inap-
propriate as a matter of law because Hashimoto was not a "prevailing party" in the EEOC action. We disagree.

[7] In cases brought under 42 U.S.C. § 2000e-l6(a). the court, in its discretion, may allow the prevailing party . .. a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-S(k). A litigant need not prevail on every issue, or even on the ~central issue" in the case. to be considered the prevailing party. Texas State Teachers Ass'n •v. Garland Independent Sch. Dist., 489 U.S. 782, 790-91 (1989). It is enough that she succeeds "on any significant claim affording some of the relief sought." Id. at

791. If the plaintiff is only partially successful in seeking the relief, and achieves only some of the benefit sought by the litigation, she is still considered the prevailing party. Stivers v. Pierce. 71 F.3d 732. 751 (9th Cir. 1995) (citing Farrar v. Hobby, 506 U.S. 103. 111-12 (1992)).2 The degree of success is irrelevant to the question whether the plaintiff is the prevailing party." Id.

[8] Here, Hashimoto sought a determination of retaliation. reinstatement and backpay in her action before the EEOC. The EEOC declared that Lowery's bad character reference was indeed motivated by retaliatory animus, but declined to award reinstatement or backpay. Instead, to remedy Lowery's retaliatory actions against Hashimoto, the EEOC ordered the Navy to (1) cease and desist its practice of notifying prospective employers of its employees' or former employees' participation in protected EEO activity; (2) remove from Hashimoto's personnel files the negative character reference disseminated by Lowery; (3) provide EEO training to Low
be court in Stivers was interpreting 42 U.S.C. § 1988. rather than 42 U.S.C. § 2000e-5(k). The Supreme Court has recognized. however. that the standards articulated in cases interpreting section 1988 "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'- Hensley v. Eckerhart, 461 U.S. 424. 433 n.7 (1983); see also Schwarz v. Secretary of Health ~ Human Servs., 73 F.3d 895, 901 n.2 (9th Cir. 1995). ery and all supervisory staff within 180 days; and (4) post copies of an EEOC notice throughout the camp.3

The government contends that the EEOC's finding of retaliation and the remedial measures it imposed are insufficient to confer 'prevailing party" status upon Hashimoto. To support its position, the government relies on Slade v. U.S. Postal Service, 952 F.2d 357 (lOth Cir. 1991), and Walker v. Anderson Electrical Connectors, 944 F.2d 841 (11th Cir. 1991). In Slade, the plaintiff successfully sought a determination by the EEOC that the Postal Service had discriminated against him on the basis of race in its decision not to hire him. 952 F.2d at 362. The EEOC declined, however, to award the plaintiff back pay or benefits. The plaintiff asserted that the EEOC's finding of discrimination entitled him to attorney's fees as a prevailing party." The Tenth Circuit rejected this argument on the ground that plaintiff had obtained no relief on the merits of his claim. Id.

In Walker, the plaintiff obtained a jury finding of sexual harassment on the part of her employer, but the jury declined to award damages. The plaintiff asserted that she was a prevailing party" and therefore entitled to

attorney's fees. The Eleventh Circuit rejected this argument, reasoning that a jury's finding of harassment, unaccompanied by any relief, ~ is not the stuff of which legal victories are made." 944 F.2d at 847 (quoting Hewitt v. Helms, 482 U.S. 755, 760 (1987)).

[9] The government asserts that Slade and Walker apply to this case because here, as in those cases, [t]he most that can be said for [Hashimoto's] 'victory' was that Major Lowery was declared to have acted in a discriminatory fashion." Both

The notice which the Navy was ordered to post conspicuously reads as follows: "[The Department of the Navy will not in any manner restrain interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by. or who participates in proceedings pursuant to, Federal equal employment opportunity law." Slade and Walker, however, are distinguishable. Here. the EEOC did more than merely determine that Hashimoto had been the victim of a retaliatory negative character reference. Although it did not order reinstatement or backpay, it did order a panoply of remedial measures, at least some of which were unquestionably personal to Hashimoto. The government's failure to acknowledge these important aspects of the EEOC's disposition of Hashimoto's claim manifests an overly narrow view of what constitutes a legal ~victory." We therefore conclude that the EEOC's order effected a ~material alteration in the legal relationship between plaintiff and defendant" sufficient to confer prevailing party status upon Hashimoto. See Stivers, 71 F.3d at 753 n.l0 (citing Farrar, 506 U.S. at 111-12); see also Smith, 659 F.2d at 1122 (plaintiff who is subject to an adverse performance evaluation in retaliation for EEO activities, but suffers no financial harm from the evaluation, is a .'prevailing party" entitled to attorney's fees even though only proper relief on the merits is removal of the improper evaluation from his personnel file).

The government alternatively challenges the reasonableness of the fee award, arguing that because Hashimoto tool: nothing tangible from either her EEOC or district court proceedings, ..the only reasonable fee is no fee at all." We acknowledge that, in cases where a civil rights plaintiff "prevails" but receives ~only de minimis relief and achieves only "technical" success, the court is permitted to bypass the general rule requiring calculation of a lodestar and simply establish a low fee or no fee at all. See Morales vs. City of San Rafael, 96 F.3d 359, 362-63 (9th Cir. 1996) (interpreting Farrar). Whether the plaintiffs "success is purely technical or de minimis," however,

is determined by examining factors beyond the amount of money damages awarded. Id. at 363 (quoting Farrar, 506 U.S. at 117 (O'Connor, J., concurring)). "Primary among such other considerations is 'the significance of the legal issues on which the plaintiff claims to have prevailed' and the 'public purpose' the plaintiff's litigation served." Id.

[10] We have recently recognized that a plaintiff who achieves a ..significant nonmonetary result not only for himself but for the community in general" attains more than a technical" victory. Id In Morales, for example, the deterrent effect of a nominal award was held to serve ''the public purpose of helping to protect [the plaintiff] and persons like him from being subjected to similar unlawful treatment in the future." Id. at 36~65. Here, as in Morales, Hashimoto obtained relief which not only benefited her personally, but also served to assist persons like her in that the EEOC's remedial measures prevented others from being subjected to retaliatory actions by the Navy. We therefore conclude that the district court properly declined to invoke the Farrar ..no fee at all" exception for cases in which the relief obtained is de minimis. See Stivers, 71 F.3d at 753 (plaintiff who obtains tangible results," but does not obtain all of the relief sought, is still entitled to fees). For these reasons, the district court did not abuse its discretion in awarding fees or in setting their amount.

III. Dismissal of the Case I Claims Arising from the 5-day Suspension and the Termination Pursuant to a RIF

During the time period relevant to this action, EEOC regulations required an aggrieved employee to alert an EEO counselor of an alleged violation within 30 days of the alleged discriminatory event. 29 C.F.R. §1613.214{a)(1)(i) (1991). The district court concluded that Hashimoto failed to contact an EEO Counselor within 30 days of her 5-day suspension, and had therefore failed to exhaust her administrative remedies. Thus, the court granted the government's motion to dismiss the claim relating to this suspension.

[11] Hashimoto asserts that this dismissal was improper because she had alleged a pattern of discriminatory acts sufficient to support a "continuing violation" theory. Under that doctrine, allegations of conduct occurring prior to the limitations period are actionable if the complainant can show that they are part of a series of related acts against the complainant. Green v. Los Angeles County Superintendent of Schs., 883 F.2d 1472, 1480 (9th Cir. 1989). We

conclude that the continuing violations doctrine does not save Hashimoto's claim relating to her 5-day suspension. To establish a continuing violation, one or more of the allegedly discriminatory acts must fall within the limitations period. Id Hashimoto failed to show that the Navy committed any discriminatory acts between the effective date of her 5-day suspension and the expiration of the 30-day limitations period.

[12] The district court also granted the government's motion to dismiss Hashimoto's discrimination claims arising from her termination pursuant to a RIF because she did not pursue those claims before the Merit Systems Protection Board ("MSPB"). The court concluded that this failure foreclosed its exercise of jurisdiction over those claims. See Hays v. Postmaster General, 868 F.2d 328, 330 (9th Cir. 1989). Hashimoto contends that the district court should not have dismissed these claims because the RIF was part of a "continuous violation" on the part of the Navy. We reject this argument. Hashimoto fails to establish how the existence of a continuous violation would cure the jurisdictional defect in her claim relating to the RIF. A district court simply does not have jurisdiction over discrimination claims that were not raised before the MSPB. Id.

IV. Summary Judgment on the Case I Retaliation Claim

On May 21, 1985, Hashimoto contacted an EEO counselor about filing a complaint. According to the EEO counselor, Hashimoto believed that she was being evaluated for work which was no longer her responsibility to perform. Upon being advised by the EEO counselor of her right to file a discriminatory complaint, Hashimoto stated that she -.did not really believe that this is a discriminatory complaint." Never
theless, the EEO counselor sent a memorandum to the personnel office endued ..POTENTIAL~ EEO COMPLAINT" detailing the interview with Hashimoto.

Hashimoto alleged that within a few months of her meeting with the EEO counselor, certain adverse employment actions were taken against her. The district court granted the government's motion for summary judgment on this retaliation claim on the ground that Hashimoto failed to establish that the government retaliated against her for engaging in "protected activity." Hashimoto contests this conclusion.

[13] To succeed in a retaliation claim, the plaintiff must demonstrate

(1) that she was engaging in protected activity, (2) that she suffered an adverse employment decision, and (3) that there was a causal link between her activity and the employment decision. Folkerson v. Circus Circus Enterprises, Inc., 107 F.3d 754, 755 (9th Cir. 1997). The district court determined that Hashimoto satisfied the last two elements, but failed to establish the first element of her prima facie case.

The district court concluded that Hashimoto's contact with the EEO counselor was not a "protected activity" in this instance because, at the time of her meeting with the EEO counselor, she did not ``reasonably believe that the employer had engaged in an unlawful employment practice" under Title VII. Rather, in the district court's view, she .'merely sought to have her personal problem [of an outdated job description] remedied." The court analogized Hashimoto's retaliation claim to the claim at issue in Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987). [here, an Hispanic disc jockey complained to his program director about an on-air Englishonly policy instituted at the radio station where he was employed. He was subsequently fired. The court upheld the district court's grant of summary judgment on his retaliation claim, reasoning that his complaint to the program director evidenced concern over his personal success at the station
rather than a concern about discrimination. Thus, it was not a "protected activity" for purposes of establishing a prima facie retaliation claim. Jurado, 813 F.2d at 1411-12.

Hashimoto asserts that her meeting with the EEO counselor was .'protected activity" because, at the time she set-up the meeting, she felt that the failure to update her job description was motivated by race and sex discrimination. In Hashimoto's view, that she no longer felt this action was discriminatory at the end of the meeting is of no moment, and the district court erred in focusing on this fact. See Gifford v. Atchison, Topeka and Santa Fe Ry. Co., 685 F.2d 1149, 1156-57 (9th Cir. 1982) (employee need not be aware that practice is unlawful under Title VII at time of complaint in order for complaint to be protected). Hashimoto's argument is compelling. but we conclude that the district court erred at a more fundamental level.

[14] Adopting the approach taken in Jurado, the district court here .'looked behind" Hashimoto's meeting with the EEO counselor and concluded that it was not protected activity because she did not at that time allege discrimination. Unlike in Jurado, however, Hashimoto did more here than merely complain to a superior. Rather, she contacted an EEO counselor about

her concerns. Even assuming her concerns were .'personal" in nature, we conclude that this contact with the EEO counselor was itself "protected activity."

[15] An employer can violate the anti-retaliation provisions of Title VII in either of two ways: "(1) if the [adverse employment action] occurs because of the employee's opposition to conduct made an unlawful employment practice by the subchapter, or (2) if it is in retaliation for the employee's participation in the machinery set up by Title VII to enforce its provisions." Si/ver v. KCA, Inc., 586 F.2d 138, 141 (9th Cir. 1981) (interpreting 42 U.S.C. § 2000e-3(a) (§ 704(a))). The considerations controlling the interpretation of the opposition clause are not entirely the same as those applying to the participation clause. The purpose of the latter is to protect the employee who utilizes the tools provided by Congress to protect his rights." Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978). The district court appears to have examined Hashimoto's retaliation claim under the opposition clause only. Under the participation clause, however, there can be little doubt that Hashimoto's visit with the EEO counselor constituted participation ..in the machinery set up by Title VII." As such, it was protected activity. See, e.g., Eastland v. Tennessee Valley Auth, 704 F.2d 613, 627 (11th Cir. 1983) (contacting an EEO officer is protected activity); Gonzalez. v. Bolger, 486 F. Supp. 595, 601 (D.D.C. 1980) (Once plaintiff ... initiates pre-complaint contact with an EEO counselor ... he is participating in a Title VII proceeding." (citations omitted)), affd, 656 F.2d 899 (D.C. Cir. 1981). Thus, we conclude that the district court erred in determining that Hashimoto failed to establish a prima facie case of retaliation.

The error does not, however, require that we reverse the district court's grant of summary judgment on this claim. After concluding that Hashimoto failed to establish a prima facie case, the district court commented that "even if Plaintiff had been successful in establishing a prima facie case of retaliation, the burden would then shift to Defendant to provide a legitimate reason for the adverse employment actions." Because the government articulated legitimate, nondiscriminatory reasons for the actions taken against Hashimoto after her contact with the EEO counselor, the court concluded that summary judgment on her retaliation claim would have been appropriate in any event.

[16] A review of the record reveals that Hashimoto made no attempt to refute the government's legitimate explanations for its actions. Her affidavit accompanying her opposition to the government's motion for summary

judgment merely states that when Captain Hinman reamed that I had contacted an EEO counselor, his harassment of me intensified and his supervisor supported all his actions. The letters of caution, proposed suspensions and threats of dismissal all began after my contact with the EEO counselor in May, 1985." Although the timing of these events suffices to establish a minimal prima facie case of retaliation, it does nothing to refute the government's proferred legitimate reasons for disciplining Hashimoto. We therefore conclude that Hashimoto failed to carry her burden of establishing a triable issue of fact on the ultimate question of whether the government retaliated against her for meeting with the EEO counselor. Thus, the district court's grant of summary judgment was appropriate. See Wallis v. J.R. Simplot Co., 26 F.3d 885, 890-91 (9th Cir. 1994) ("[W]hen evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal puma facie case.").

V. Judgment on the Remaining Case I Claims

[17] Hashimoto contends that the district court's judgment on her Case 1 claims is flawed because it is based on clearly erroneous findings of fact. She first asserts that the testimony of Hinman and Lowery should not have been credited because they allegedly made various misstatements of fact during the first and second trials and in certain documents admitted into evidence. This is a credibility determination, and we therefore treat it as such. See Nicholson v. Rushen, 767 F.2d 1426, 1427 (9th Cir. 1983) treating assertion on appeal that witnesses committed perjury, based solely on evidence which was before the factfinder, as attack on credibility finding). The district court's credibility determinations are entitled to special deference. Fed. R. Civ. P. 52(a); Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); EEOC v. Bruno's Restaurant, 13 F.3d 285, 287 (9th Cir. 1993); Jordan v. Clark.-847 F.2d 1368, 1375 (9~ Cir. 1988) (.Credibility determinations are insulated from appellate review.").

[18] The alleged misstatements provide no reason to disturb the district court's decision to credit Hinman and Lowery. On February 18, 1986, Hinman sent a handwritten note to Hashimoto referencing a discussion they had on February 10. In the first trial, Hinman testified that he did not recall having a discussion with Hashimoto during the three week period preceding this note. Counsel for Hashimoto subsequently pointed out the reference to the February 10 discussion, and Hinman acknowledged his mistake. In the second trial, Hinman affirmatively stated that he had a discussion with Hashimoto on that

date. Hashimoto characterizes this as a ~dramatic change in testimony" between the first and second trials. We disagree with this characterization. Hinman justified his change in testimony by stating that his memory on this issue had been refreshed in the first trial, a justification which we conclude is reasonable under the circumstances.

Hashimoto next points to the negative reference which Lowery disseminated to the Army on August 10, 1988, in which he wrote that Hashimoto failed to follow guidance from audit teams resulting in loss to fund of approximately] $140,000." At trial, Lowery acknowledged that Hashimoto did not have authority to commit the expenditure of that money without approval of a superior. Hashimoto fails to articulate how the requirement of a signature by a superior to release the money undermines Lowery's statement in the job reference that she failed to follow guidance from the audit team. Thus, she has established no inconsistency between these statements.

Hashimoto further challenges Lowery's testimony at trial regarding the termination of her position by RIF. As her RIF claim was dismissed on procedural grounds prior to trial, however, any statements by Lowery on this matter at trial relate to immaterial facts. The district court was not required to discredit Lowery's material testimony because an immaterial part of his testimony was in dispute.

Next, Hashimoto challenges the district court's finding that Hashimoto's job description accurately reflected the work that she was required to perform and upon which her performance was evaluated. Hashimoto, 870 F. Supp. at 1551 (¶40). She contends that the district court failed to consider adequately the testimony of Ray Mendez and Ruth Christiansen on this matter. The court, however, expressly found that the testimony of Ray Mendez lacked credibility because his assessment of Hashimoto's job description was based solely on the information provided by Hashimoto. Id. (139). The court did not expressly acknowledge the testimony of Ruth Christiansen, but "[a] judge is not required, in making findings, to mention every item of evidence and either adopt or reject it." Western Pac. Fisheries, Inc. v. 55 President Grant, 730 F.2d 1280, 1285 (9th Cir. 1984). The appellate court presume[s] that the [trial] judge considers all of the evidence. and relies on so much of it as supports the finding and rejects what does not support the finding, unless the judge states otherwise." Id.

Hashimoto also challenges the district court's specific factual findings relating to her 5-day4 and 14-day suspensions. Because her 5-day suspension claim was dismissed on procedural grounds prior to trial. the district court's findings related to this incident are immaterial. Regarding the 14-day suspension, the district court found that it was motivated by Hashimoto's failure to comply with Hinman's order to prepare a turnover file, and that Hashimoto understood the order. Hashimoto, 870 F. Supp. at 1553 (¶¶57-58). Hashimoto contends that the district court failed to address contradictory evidence on these points. To the contrary, the court expressly acknowledged each and every piece of contradictory' evidence which Hashimoto recites, but found that the 1 4-day suspension was justified. 870 F. Supp. at 1553 (¶¶54-58). This finding is not clearly erroneous.

The incidents underlying the S-day suspension were: (1) Hashimoto s alleged failure to keep Hinman apprised of her whereabouts: (2) her defiance of Hinman's instruction to deliver paychecks to a librarian: and (3) her refusal to correct her ~time card. Hashimoto. 870 F. Supp. at 1552 ('SO).

Finally, Hashimoto contends that the trial court's findings, when viewed in the light of the two contradictory jury verdicts, are suspicious and should be reversed as clearly erroneous. Although the verdicts, at an intuitive level, are a cause for concern, we conclude chat there is no legal basis for departing from the traditional "special deference" accorded a trial court's factual findings in these circumstances. Indeed, the Seventh Circuit recently approved of the procedure utilized in this case. In Dombeck v. Milwaukee Valve Co., 40 F.3d 230 (7th Cir. 1994), the court considered whether a bench trial is required when a Title VII action is erroneously submitted to a jury under Landgraf. The court concluded that a district court is not required to conduct an entirely new trial. Dombeck, 40 F.3d at 237. Although as an appellate court reviewing a cold record, we are unable to make credibility determinations and to resolve existing factual disparities, the district court would not operate under the same disability, as that court heard the evidence along with the jury. The error in submitting [plaintiff's] Title VII claim to a jury could thus be cured by the entry of independent findings of fact and conclusions of law by the district judge." Id. That is precisely what the district court did here, and we decline to second-guess the district court's findings.

VI Conclusion

[19] The district court did not err in awarding Hashimoto attorney's

fees for her counsel's efforts in prosecuting her Case 2 retaliation claim. Further, the district court did not err in dismissing two of Hashimoto's Case 1 claims on procedural grounds, granting summary judgment in favor of the government on her Case 1 retaliation claim, and granting judgment in the government's favor on the remaining Case 1 claims.
AFFIRMED.

PRINTED FOR
Administrative OFFICE—U.S. COURTS
BY BARCLAYS / ELECTROGRAPHIC SAN FRANCISO
(800) 888-3600

The summary. which does not constiolte a part of the opinion of the coun"
is copyrighted
0 1997 by Barclays Law Publishers.

Appendix E

UNITED STATES NINTH CIRCUIT COURT OF APPEALS DENIAL OF SECRETARY OF NAVY'S PETITION FOR REHEARING

FILED

SEP 09, 1997

CATHY A. CATTERS, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BABARA MATSUKO HASHIMOTO
Plaintiff-Appellee-
Cross-Appellant,

v.

JOHN DALTON, Secretary of the Navy
Defendant-Appellant-
Cross-Appellee.

C.A. Nos. 95-15827
95-15960

D.C. No. CV-91-00081-ACK

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Before: SKOPIL, CANBY and RYMER, Circuit Judges

The panel has unanimously voted to deny the government's petition for rehearing. Accordingly, the petition for rehearing is DENIED.

Appendix F

REVOCATION OF AUTHORITY TO SIGN
CORRESPONDENCE DATED 30 NOV 84

UNITED STATES MARINE CORPS
HEADQUARTERS AND SERVICE BATTALION, FMFPAC
CAMP H. M. SMITH
CAMP H. M. SMITH, HI 96861-5010

From: Special Services Officer
To: Mrs B. HASHIHOTO, Budget Assistant, 0561, GS-7

Subj: REVOCATION OF AUTHORITY TO SIGN
CORRESPONDENCE

1. As of I December 1984 you will no longer sign matters concerning Special Services, Morale, Welfare and Recreation section, nor Camp H.M. Smith, with the exception of matters that specifically require your signature as the Custodian of the Recreation Fund.

2. All matters that require your signature as the Custodian of the Recreation Fund will be submitted to me for approval prior to release. My initials on these matters will represent my approval for release.

3. All matters that do not specifically require your signature but are required to be released in order to accomplish your job responsibilities will be signed by me.

S/ C.N. HINMAN
C.N. HINMAN

Appendix G

ESTABLISHMENT OF COMPUTER SUPPORTED MANAGEMENT INFORMATION SYSTEM (MIS) FOR MARINE CORPS CLUB AND RECREATION PROGRAMS

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
WASHINGTON, D.C. 20380

From: To: Commandant of the Marine Corps
Distribution List

Subj: Establishment of Computer Supported Management Information System (MIS) for Marine Corps Club and Recreation Programs

Encl: (1) Volume I, General Preparation Information, 1 December 1983

1. On 26 September 1983, the implementation of the MIS with consolidated club/recreation administrative offices at 17 mayor commands was approved. The enclosure is forwarded as an introduction to the MIS project and to provide information on: the new organization and related preparation aspects. All organizational and preparation requirements must be completed by commands prior to commencing implementation of the automated system.

2. This system is currently installed at Marine Corps. Development and Education Command (MCDEC), Quantico, Virginia. The following commands have already received the enclosure and are therefore not listed on distribution of this letter:

MCAS, El Toro, CA
MCAS, Cherry Point, NC
MCB, Camp Lejeune, NC
MCAS, New River, NC
MCAS, Beaufort, SC

3. It should be noted that the time frame presented in the . implementation schedule, page 1-6 of the enclosure, represents the best estimate for installing all automated systems with the aid of Headquarters

Marine Corps manpower resources. This Headquarters desires to maintain the implementation schedule as closely as possible. Where lead time exists the Command may accomplish the organization and preparation requirements, set [forth in steps 1 through 19 of Attachment 5 of the enclosure, at the earliest date regardless of the anticipated schedule for installing the automated system.

4. The Headquarters Marine Corps point of contact for the MIS project is Mr. Bob Bieshelt, (Code MSI), Autovon 227-8595.

Subj: Establishment of Computer Supported Management Information System (MIS) for Marine Corps Club and Recreation Programs.

5. Further information regarding specific issues and confirmation of the automated system installation dates will be coordinated with commands an the Implementation of the MIS project progresses.

E. J. CLARKSON
By direction

DISTRIBUTION LIST:
CG, MCB Camp Butler, FPO Seattle 98773
CG, MCRD, San Diego, CA 92140
CO, MCLB, Albany, GA 31704
CG, MCRD, Parris Island, SC 29905
CO, MCB, Camp Pendleton, CA 92055
CG, MCAGCC, Twentynine Palms, CA 92278
CO, MCLB, Barstow, CA 92311
CO, MCAS, Yuma, AZ 05364
CO, MCAS, Kaneohe Bay, HI 96863
CO, MCAS, Iwakuni, FPO Seattle 98764
CO, Camp Smith, HI 96861

2001. MASD STAFF REQUIREMENTS.

1. Staffing Strength. Since the size and complexity of club and recreation operations differ greatly between commands, the size of MASD staffs will also be different between commands. The total number of employees in the initial MASD office configuration will equal the combined number of club and recreation fund employees now on board. The formation of the MASD

organization or the conversion to automation will not require a larger staff. In fact, the test of the MIS at MCDEC, Quantico, VA, identified significant manpower savings resulting from automation and combined administrative staffs. Eventually, the size of the MASD staff may be reduced through-attrition and adjustments in the number of employees assigned to the automated subsystems of General Ledger, Accounts Payable, Accounts Receivable and Inventory Control. In the future, commands should attempt to match the MASD staff-levels with manpower savings that result through automation of manual tasks and increased proficiency of the personnel. While staff reductions may occur through attrition during the implementation of the MASD organization, no reductions in force are to be imposed. Any reductions in MASD staffing levels as a result of improved . administrative operations after implementation of the automated system will remain a local command decision.

2. Combining Staffs. The task of collocating/combining club and recreation accounting and administrative personnel into the MASD organizational facility will be the responsibility of the Command's Services Officer. The task will also involve coordination efforts of Club and Recreation Program Directors. All administrative and policy issues (i.e., personnel assignments, facilities selection/ renovation/construction coordination, space requirements, schedules, moving contractors' T/O modifications, procurement actions, etc.) relating to the consolidation of Club and Recreation fund administrative offices will be accomplished solely by the commands. Basically, employees with the same functional duties will be grouped together in the new MASD office layout. A Prototype Morale Administrative Support Organization chart is provided in ATTACHMENT 2. The new MASD organization should be aligned according to the functional areas in this example to be compatible with the automated subsystems of the MIS. ATTACHMENT 2 represents organizational alignments for commands with combined club and special services annual revenue in the four to ten million dollar range. Commands with combined annual revenue in excess of this range may require additional supervisory positions to effectively manage larger staffs. Conversely, commands with comvined annual revenues below four millions dollars may required fewer supervisory and clerical positions. ATTACHMENT 2 represents the mid-range size of club and recreation operations and is placed herein for guidance from which commands can arrive at specific organizational alignments based upon existing staff levels. Increased staffing levels are not intended and should be avoided.

2002. OTHER ORGANIZATIONAL/LOGISTICAL CONSIDERATIONS. Except for the automation of certain manual tasks and procedures, the functional responsibilities of employees will generally remain the same in the new system. However, there are other requirements and considerations resulting from the new organization and automation that must be addressed. These include:

1. Director, MASD. A new management level position of Director, MASD must be established. The Director, MASD, will be responsible for the automated system and all administrative and accounting functions that support both club and recreation operations. The Director will report on MWR administrative matters to the Command Services Officer on an equal line authority with the Club and Recreation Program Directors. Commands should use caution to select a qualified person for this
out during the system implementation time period with the assistance of the MIS on-site Implementor.

3. Organizational/Functional Changes in Program Management.

a. Recreation Fund Custodian and Command Club Management System (CCMS) Treasurer Billets. Due to the consolidation of club and recreation account~i'ng operations in MASD and the ability of the automated MIS to maintain the integrity of.NAEI funds through.separate balan.ce sheets, the general duties and responsibilities of the Recreation Fund Custodian and the CCMS Treasurer will no longer.be.required as they currently exist. Therefore, alternative functions or billets' for these individuals, where.they exist, must be .' considered when the reorganization is accompli.shed. If the individuals in these positions.are not.assigned to functional 'areas or positions within the MASD, an opt'ion:that'should'be 'considered is to convert these billets to.budget analyst positions and~designate the individuals as staff assistants to the Club and Recreation Program Managers as indicated in ATTACHMENT 2.

b. Staff Assistant/Budget Analyst. As the budget analyst within the Program Manager's office, the responsibilities for NAF budget preparation, all appropriated fund accounting requirements and budget initiatives, and day-to-day financial training of. activit'' managers would be assigned to the individuals in these billets. A sample position description for these billets is contained in ATTACHMENT 4. If a separate billet'is not established as described in ATTACHMENT 4, the functions delineated therein will still be

accomplished in the Program Manager's office, not in the MASD.

c. Program Management Position Descriptions. All position descriptions within the club, package store, and recreation programs will require minor changes as a result of this

Appendix H

SPECIAL APPRAISAL OF PERFORMANCE DATED NOV 29, 1985

UNITED STATES MARINE CORPS
HEADQUARTERS AND SERVICES BATTALION, FMFPAC
CAMP H.M. SMITH
CAMP H.M. SMITH, HI 96861-5010

From: Special Services Officer
To: Mrs. B. Hashimoto, Budget Assistant, 0561, GS-7

Subj: SPECIAL APPRAISAL OF PERFORMANCE

Ref: (a)DON Performance Appraisal, NAVSO 1243/9, for your position of Budget Assistant, 0561/07, CS-0180
(b)My ltr 5800/1 dtd 28 Jun 1965.
(c) My ltr 12290/21 dtd 11 Sept 1985.

1. Reference (a) describes the critical elements of your position and establishes the standards for evaluating your performance. Reference (b) is a letter informing you that your performance on two critical elements was unsatisfactory. Reference (c) extended the period of observation on your performance for this special appraisal until 5 October 1985. From 5 July 1985 until 5 October 1985 your performance has been observed and appraised as indicated below.

2. Your performance on the first critical element as described in reference (a) was marginal. During this period you attained minimal acceptable standards and improvement is needed. Your preparation of reports and correspondence has been routinely late.

3. Your performance on the fourth critical element as described in reference (a) was highly satisfactory. You failed to follow instructions of conducting quarterly inventories and implementing internal control procedures but inspite of your lack of effort, control of property was effective through the efforts of other personnel. The official inventory of the Recreation Fund Property indicated a minimal loss of property.

4. Your overall performance for this period is marginal. Marginal performance is considered less than satisfactory and in need of improvement. Marginal performance does not qualify you for within-grade increases. Please refer to reference (a) and (b) for guidance on improving you performance. Your signature below indicates receipt of this letter.

s/C.N. HINMAN
C.N. HINMAN

Appendix I
WITHHOLDING OF WITHIN GRADE INCREASE
DATED APR 23, 1986

UNITED STATES MARINE CORPS
HEADQUARTERS AND SERVICE BATTALION, FMFPAC
CAMP H.M. SMITH
CAMP H.M. SMITH, HI 96861-5010

From: Special Services Officer
To: Mrs. B. Hashimoto, Budget Assistant, 0561, GS-7

Subj: WITHHOLDING OF WITHIN GRADE INCREASE

Ref: (a) My ltr 5800/21 dtd 29 NoV 85
(b) My ltr 12274/21 dtd 6 Feb 86
(c) DON Performance Appraisal, NAVSO 1243/9 for your position of Budget Assistant, 0561/07, GS-01-80

1. This letter is to notify you that I am withholding your within grade increase that was due on 13 April 1996. On 5 December 1986 I informed you that you were performing at a marginal level of competence. I explained to you how you could improve your work performance, and that if your performance did not improve, I would withhold your within grade increase. Reference (a) is a summary of our discussion which I gave you on 5 December, 1985. I also informed you that I was available to assist you. Again on 18 February 1986 I notified you that your performance was marginal and that this would result in my withholding your within grade increase if you did not demonstrate improvement. This was summarized in reference (b). To date, you have not demonstrated an acceptable level of competence of work to which you have been assigned. The following defects in the quality and quantity of your work are therefore outlined as follows:

a. Critical element No. 1 reference (c) requires you to "Prepare budget reports and correspondence involving Special Services Non-appropriated Funds" Your preparation of correspondence was routinely late and corrections were required. This is considered marginal performance.

b. Critical element No. 2 of reference (c) requires you to "Administer accounting, reporting and budgeting c. Special Services Appropriated Funds. Your preparation of reports and budgets for Appropriated Funds was not

completed on schedule. Specifically the preparation of Appropriated Funds budgets by Special Services activities was not completed as you were instructed. Also you failed to present the Fiscal Clerks Turnover file as you were instructed on 1 December 1985. This has been a discrepancy on several inspections since January 1985. This performance is considered marginal.

c. Critical element No. 5 of reference (c) requires you to "Train Activity Mangers on Financial Management" Your training of the activity managers has been marginal. They have not received training on the financial reports and thus could not understand the budget variance reports or the operating statements. They did not receive adequate training in financial management and this has resulted in numerous discrepancies.

Appendix J

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII; TRANSCRIPT OF PROCEEDINGS; OCTOBER 20, 1993, pp. 109-110; PARTIAL TRANSCRIPT OF RUTH CHRISTENSEN'S CROSS EXAMINATION.

Q. And this typist performed the work of yourself, Captain Hinman, Captain Lowery, and Barbara Hashimoto; isn't that correct?

A. I believe he did some Barbara's work, too, yes.

Q. But you do recall that he performed the typing work for yourself, Captain Lowery and Captain Hinman?

A. Yes.

Q. And you're not sure as to whether he did the work for Barbara Hashimoto?

A. I don't know if it would have been directly from her or through her supervisor.

Q. Isn't it true that Barbara Hashimoto did not have access to the general ledger of the Non-appropriated funds activities after the consolidation?

A. It was not a ledger that was kept out in the open where she could go to it, without having permission either from myself or from Joan.

Q. Okay.

A. It was in our custody and locked.

Q. I'm sorry?

A. It was in our custody and always locked.

Q. Always locked. It was locked in your office?

A. Either in my office or in the file -- in Joan's officer the file cabinet in Joan's, as are all books of record.

Q. And Captain Hinman never advised you to give the general ledger of the Non-appropriated funds to Barbara Hashimoto for her review, did he?

A. I don't recall him ever asking for the general ledger for her review.

Q. And the general ledger is a pretty big book, at least two feet long, isn't that correct?

A. That's right.

Q. And it's quite thick, too, is it not?

A. That's right.

Q. And this was something that you folks kept in a locked file cabinet?

A. All books of record are kept in locked file cabinets.

Q. And who had keys to that locked file cabinet?

A. I don't know of anybody besides Joan and myself, right off the top of my head.

Q. Barbara Hashimoto did not have a key to that file cabinet, did she?

Appendix K

CAPT. LOWERY'S INSTRUCTION ASSUMING RESPONSIBILITIES FOR APPROPRIATED FUNDS FOR MWR.

A. I don't believe so.

UNITED STATES MARINE CORPS
HEADQUARTERS AND SERVICE BATTALION, FMFPAC
CAMP H. M. SMITH
CAMP H. M. SMITH, H1 96861-5010

From: Director, Morale, Welfare and Recreation
To: Director, Morale Administrative Support Unit
Director, Camp Club System
Special Services Officer

Subj: FUND ADMINISTRATION

1. Effective this date I have assumed the responsibilities as Fund Administrator for those appropriated funds allocated by the Camp Comptroller for the support of those functional areas under the cognizance of this section.

2. The Director, Morale Administrative Support Unit is hereby tasked to provide the administrative support necessary to establish the required internal controls.

3. The Camp Comptroller has indicated that spending authority based on the midyear review will be established shortly. Until then, only administrative and sanitation supplies may be ordered. Major operating expenses, i.e., salary reimbursements, janitorial reimbursements, etc., will be carried as an account receivable.

4. Once the obligation levels are received and limits established for each of the units of this section, contracting or purchases of equipment will be authorized. The procedure will be effected by the respective head of the concerned unit signing a request/authorization. Such a request will be compared by the MASU against the current spending ceiling to ensure sufficient funds are available. If the funds are insufficient the request/ authorization will be returned. If not, the purchase will be effected. The MASU will provide to myself and the head of each unit a monthly report indicating the current level of expenditure and the funds remaining.

S/S.M. LOWERY

Appendix L

MEMO FROM BARBARA HASHIMOTO TO CAPT. HINMAN REGARDING NON-APPROPRIATED FUNDS DISCREPANCIES IN FINANCIAL STATEMENTS COMPLETED BY RUTH CHRISTENSEN UA-11

S.M. LOWERY

OPNAV 5216/144B (Rev.8-81)
S/N 0107-LF-052-2322
Date: 26 April 1985

FROM: Barbara Hashimoto

To: Capt. Hinman

SUBJ: Interest income for Second Quarter of FY-85

As you are weIl aware, I only receive monthly/quarterly statements and not day to day transactions of accounts. The monthly figures for interest income for the third quarter of FY-85 were: 1) January $2,374.31, 2) February $731.05 and 3) March S1,812.84. the monthly figure for February was unusually low in this category. I made informal inquiries to Mrs. Ruth Christensen and yourself on 24 April 1985. I frankly feel the explanation given to me is not complete and does not account for the magnitude of the net effect on the interest income figure for February 1985.

As these informal methods of establishing the cause have been unsatisfactory, I would suggest you investigate or cause this matter, to be investigated.

Appendix M

COMMANDING OFFICER RELIEVING BARBARA HASHIMOTO GS-7 OF ALL INVENTORY AND PLANT ACCOUNT EQUIPMENT AND APPOINTING CHARLES LEVESQUE UA-9.
DATED 12 NOV. 1985

UNITED STATES MARINE CORPS
HEADQUARTERS AND SERVICE BATTALION, FMFPAC
CAMP H.M. SMITH
CAMP H.M. SMITH, HI 96861

12 NOV 1985

From: Commanding Officer
To: MR. C. A. LEVESQUE

Subj: APPOINTMENT OF RESPONSIBLE OFFICER

Ref: (a) UM 4400-15

1. In accordance with instructions contained in reference (a), you are appointed as Responsible Officer for account number/name: 26/Morale. Welfare and Recreation vice MS Barbara Hashimoto relieved.

2. Within ten days from the date of this letter, you will hold an inventory and sign the original Consolidated Memorandum Receipt on charge to your account. The CMR's records are held by the Supply Office located in building number 28.

3. Your inventory will include all Type I and Type II items on charge to your account as reflected on the allowance list.

4. Any discrepancies noted during your inventory will be reported to the Battalion Commander via the Supply Officer as soon as possible.

5. Plant Account items are controlled by the Consolidated Fiscal Accounting Office (CFAO), located at MCAS Kaneohe Bay. You will notify the CFAO Office via Camp Comptroller, Camp H. M. Smith, within five days receipt of this letter regarding the inventory and assumption of responsibility for Plant Account Equipment.

6. At least ten working days prior to your relief, you will provide the name of your successor to the Supply Officer; ensure that the property records

reflect the true status of material within your account; and effect such reconciliation action as may be required to adjust the records.

7. All designated Responsible Officers will check out from the Camp Comptroller prior to detachment from this Command.

S/ G.E. Castagnetti
G.E. CASTAGNETTI

Appendix N

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII; TRANSCRIPT OF PROCEEDINGS; OCTOBER 20, 1993, pp. 55-57 PARTIAL TRANSCRIPT OF HAROLD NAKABAYASHI. CROSS EXAMINATION SHOWING HE DID TAKE UNRECORDED COMPENSATORY TIME.

Q. And during these meetings -- morning meetings that you had with Captain Hinman, isn't it a fact that the recreation director did not -- was not present at all times when you met with Captain Hinman in the mornings?

A. No, he was not present at every meeting.

Q. And you have no idea, yourself, as to whether the recreation director was ordered or directed by Captain Hinman to meet with Captain Hinman in the mornings, do you?

A. Can you repeat that again, please?

Q. You have no idea as to whether the recreation director was required to attend meetings in the mornings with Captain Hinman?

A. To my knowledge, no.

Q. You do not recall if you were required to report to Captain Hinman at the end of each day, do you?

A. Come again?

Q. You do not recall if you were required to report to Captain Hinman, and meet with him, at the end of each day, do you?

A. No, I was not required, but I did it.

Q. Do you recall stating previously under oath that you don't recall being required to report to Captain Hinman at the end of each day?

A. I wasn't required, but I did it voluntarily, on my own.

Q. You were not required to work at nights, were you?

A. No.

Q. But you did attend athletic events on your own, did you not?

A. Yes.

Q. And when you did work at nights, you would take comp time off during the day and play tennis or racquetball; isn't that correct?

A. Yes, but I don't -- I don't think you would call it comp time. I Just took time off to be compensated for what I was -- my regular Job. Just like a split shift or something like that.

Q. Do you recall stating, in response to one of my questions, previously, that you did take time off during the day to play tennis and racquetball, and I asked you specifically about the issue of comp time?

A. But it wasn't compensated, it wasn't paid for.

Q. That was to compensate you for the time that you had worked at nights: isn't that correct?

A. Yes.

Q. And that's the same as comp time, is it not?

A. I have no idea.

Q. And this taking of time off to compensate you for the time that you had worked at nights, at your own volition, to attend these athletic meetings, occurred two to three times a week; isn't that correct?

A. Yes.

Q. And this occurred on a regular basis, two to three time each week that you worked at Camp Smith; isn't that correct?

A. Yes.

Q. And Captain Hinman was the supervisor who signed your time cards, is he not?

A. Yes.

Q. And he never questioned you about the two to three times a week that you took time off to play racquetball and tennis?

A. No.

Q. And this was done on a regular basis at Camp Smith during the daylight hours?

A. Yes.

Q. And you don't have any recollection as to whether the recreation director at Camp Smith, during the time that you were there as the athletic director, was required to meet with Captain Hinman in the afternoons at the end of each day, do you?

A. Not to my knowledge.

Q. You never new him attend any meetings, did you?

A. Yes, I have seen him attend meetings.

Q. On a daily basis or irregularly?

A. Irregularly.

Q. Thank you, Mr. Nakabayashi

Q. Do you know what Captain Hinman meant by a turnover folder in the

Appendix O

PARTIAL HEARING TRANSCRIPT OF CAPT. LOWERY FROM EEOC-SFDO ON WED JULY 12, 1989, PP 537-539. DURING CROSS-EXAMINATION, LOWERY RESPONDS THAT A TURNOVER FOLDER IN THE FORM OF A LETTER OF INSTRUCTION IS CONFUSING TWO TERMS, EXACTLY WHAT PLAINTIFF HAD QUERIED CAPT. HINMAN ABOUT.

form of a letter of instruction?

A. No. That's confusing two terms. And I've seen that in one of the statements. In fact, I think it was one of Ms. Hashimoto's. She talked about a letter of instruction and a turnover folder and those are two separate things.

The letter of instruction is referred to as an LOI. There is no set format for one. Its simply means what it says. It is a letter of instruction from somebody to somebody subordinate telling them to do things.

We write letters of instruction from the general here to subordinate generals telling them, Go have an exercise. And they'll tell them in ten pages where to have it, when and how much money to spend, and so on. It's all the details.

A turnover folder is just that as it's something that you can turn over to somebody who's going to replace you. So that if you get hit by a car the next day and you're out catastrophically, they can pick up the book.

And it would typically have a list of points of contrast so you'll know who to call in the offices there, wire diagrams showing how you're related to other-, who your peers are that you'd work with in parallel organizations, the higher subordinate organizations, list of telephone calls.

It would also have a mattering of forms to fills out so that you could follow some kind of a procedure. So if somebody picked up the phone and said you needed to have submitted form X, you could flip through the book and here's the rough sample of form X filled out so that you could probably work or stumble your way through it.

Q. So your understanding is that the proper document to have been done in this case was a turnover folder?

A. That's correct. There's no necessity nor did we ever deal with anybody with the letter of instruction. Somebody's just administratively confusing two terms. That's all.

JUDGE TEETER: Well, that somebody is Captain Hinman. He just testified that he wanted a turnover file in the form of a letter of instruction.

THE WITNESS: Then you're going to have to say in the heading or on the title page of the thing that thin is a letter of instruction and this is how you would follow it. And you're going to have a section A which has so and so in it and section B would have so and so in it.

JUDGE TEETER: Did that come up in your investigation?

THE WITNESS: No, because the camp order talked about turnover folders. It doesn't use the term letter of instruction.

An LOI is usually just that. It's a directive from a higher authority to a subordinate party to go do something and it tells them how to do it.

JUDGE TEETER: Ms. Ing.

Q. (By Ms. Ing) Is there anybody else you talked to in investigating that 14-day suspension other than the someone in the comptroller's office?

Appendix P

DAILY ROUTINE MEMO FROM HINMAN TO B. HASHIMOTO

DATE: 3 Dec 84

FROM: Special Services Officer

To: Mrs. B. HASHIMOTO, Budget Assistant, 0561, GS-7

SUBJ: DAILY ROUTINE

1. In order to ensure adequate supervision of the Recreation Fund and Appropriate Funds it IS necessary that regular and frequent communication be maintained between you and I.

2. Therefore report to me at 0730 and prior to 1600 for daily briefings. If I am not in the area, report to the Special Services Chief.

3. If you are going to be away from your office for more than thirty minutes notify me, if I am not in the area notify the Special Services Chief.

4. By following this daily routine the coordination and accountability of our financial affairs should be improved.

S/C.N. Hinman
C.N. HINMAN

Appendix Q

PROPOSED SUSPENSION OF FIVE (5) CALENDAR DAYS

UNITED STATES MARINE CORPS
HEADQUARTERS AND SERVICE BATTALION, FMFPAC
CAMP H.M. SMITH
CAMP H.M. SMITH, HI 96861-5010

From: Special Services Officer
To: Mrs. B. Hashimoto, Budget Assistant, 0561, GS-7

Subj: PROPOSED SUSPENSION OF FIVE (5) CALENDAR DAYS

Ref: (a) My memo of 3 Dec e4
(b) My ltr 5000/21 of 5 Feb 85
(c) My ltr 12000/21 of 30 Jul 85
(d) Dir MWR ltr 12274 of 24 Oct 85

1. This is notice of my proposal to suspend you from your position for refusing to comply with my verbal and written orders.

2. On.3 December 1984 reference (a) was issued to provide written instructions to you regarding the importance of briefing me at specific times on a daily basis. You ignored this instruction necessitating the issuance of reference (b), which was intended to impress you with the importance of complying with my earlier orders. Reference (c), a proposal to you as a result of your continued failure to follow instructions. Reference (d) was a letter of admonishment to you as a result of your conduct elaborated on in reference (c).

3. Since 24 October 1985 you have frequently failed to follow my verbal and written instructions of briefing me on a daily basis. In contradiction to my instructions in reference (a), you have continued to come and go without notifying me of your whereabouts nor briefing me on your activities.

4. On 21 November 1985 you submitted to me your time card which you had prepared and signed indicating it was accurate. The time card indicated you had worked eight hours on 20 November 1985 when you were in fact not at work. You refused to comply with my instructions of correcting the card. You stated words to the effect "If you went it changed you can do it yourself.".

Your conduct was disobedient.

5. On 22 November 1985 I instructed you to deliver pay checks to the library. You refused to comply with my instructions. Your conduct was disobedient.

6. The incidents discussed above are reflective of your general conduct which is disobedient. Your conduct has undermined the efforts of this organization to accomplish our mission and cannot be further tolerated.

7. You have the right to answer this notice orally and/or in writing. You may arrange to answer by contacting the Director, Morale, Welfare and Recreation. You may submit affidavits or other evidence in support of your answer. You have the right to review the material on which this proposed removal is based and which is relied on to support the reasons in this notice of proposal. You will be allowed up to four hours of official time to review the material relied on support these reasons, to secure affidavits, and to prepare an answer to this notice.

Appendix R

MERIT SYSTEM PROTECTION BOARD APPEAL. ITEM 25. "HAVE YOU FILED A DISCRIMINATION COMPLAINT WITH YOUR AGENCY OR ANY OTHER AGENCY? YES (ATTACH COPY)"

PART 1. APPELANT IDENTIFICATION

1. NAME *(Last, First, Middle)*
Hashimoto, Barbara M.

2.SOCIAL SECURITY NUMBER
575-42-3870

3. PRESENT ADDRESS *(Number and street, city, state, and ZIP code)*
1538 Ala Amoamo Street
Honolulu, Hawaii 96819

4. HOME PHONE *(Include area code)*
(808) 839-1507

PART II. APPEALED ACTION

6. BRIEFLY DESCRIBE *AGENCY ACTION* YOU WISH TO APPEAL AND ATTACH ANY RELEVANT DOCUMENTS
Reduction in force

6A. APPEALS ARBITRATION. FOR A MATTER APPEALABLE TO THE BOARD, ANY APPELANT MAY ELECT APPEALS ARBITRATION AS AN ALTERNATIVE TO THE FORMAL KSPB APPEALS PROCESS. (A detailed explanation of the arbitration process is attached to this form.) PLEASE CHECK ONE OF THE BOXES BELOW

- ✓ YES, I ELECT APPEALS ARBITRATION
- o NO, I DO NOT ELECT APPEALS ARBITRATION

7. NAME AND ADDRESS OF ACTING AGENCY *(Including Bureau,*

or other Division as well as street address, city, state, and ZIP code)
USMC, Headquarter & Serv. Batt., FMFPAC
Camp H.M. Smith
Camp H.M. Smith, Hawaii 96861-5010

8. APPELLANT'S POSITION TITLE AT TIME OF ACTION
Budget Assistant 561

9. GRADE AT TIME OF ACITON
GS-7

10. SALARY AT TIME OF ACTION
$19,606 per year

11. ARE YOU A VETERAN OR ENTITLED TO THE EMPLOYMENT RIGHTS OF A VETERAN?
❑ NO ☑ YES

12. TYPE OF APPOINTMENT
❑ Temporary ❑ Applicant
☑ Permanent ❑ Term

13. TYPE OF SERVICE
☑ Competitive ❑ Excepted

14. LENGTH OF GOVERNMENT SERVICE
11 Years

15. LENGTH OF SERVICE WITH ACTING AGENCY
2 Years

16. ARE YOU RETIRED?
❑ YES ☑ NO

16A. IF SO, DATE OF RETIREMENT (*Month, day, year)*

17. WERE YOU SERVING PROBATION OR TRIAL PERIOD AT TIME ACTION WAS TAKEN BY THE AGENCY?
☑ NO ❑ YES

18. DATE WRITTEN PROPOSED ACTION NOTICE RECEIVED *(Month, day, year) (Attach copy)*
2/18/86

19. DATE FINAL DECISION NOTICE RECEIVED *(Month, day, year)*
3/3/86

20. EFFECTIVE DATE OF ACTION *(Month, day, year)*
6/2/86

21. WHY DO YOU THINK THE AGENCY WAS WRONG IN TAKING THIS ACTION *(Explain details)*?
Management is using the RIF as a subterfuge. They are trying to get rid of me for EEO reasons, and using RIF to do it as described in my EEO formal complaint.

22. WHAT ACTION WOULD YOU LIKE THE BOARD TO TAKE ON THIS CASE?
I would like the Board to conduct a fair and impartial investigation and review of all the actions leading up to my RIF, as well as the implementation of the RIF itself. I strongly believe that it will show an abuse of personnel precedures and that my separation was totally unwarranted and illegal.

23. HAVE YOU, OR ANYONE ON YOUR BEHALF, FILED A FORMAL GRIEVANCE OR COMPLAINT, INCLUDING AN UNFAIR LABOR FORCE PRACTICE CHARGE, WITH YOUT AGENCY OR ANY OTHER AGENCY CONCERNING THIS MATTER?
❑ NO ☑ YES (Attach copy)

23A. IF YES, DATE FILED *(Month, day, year)*
4/4/86

23B. PLACE FILED *(Agency and location)*
(EEOO) Lt. Gen. D'Wayne Gray
Commanding General
Fleet Marine Force, Pacific

23C. HAS THERE BEEN A DECISION?
☑ NO ❑ YES

23D. IF YES, DATE ISSUED *(Month, day, year)*

23E. NAME OF ISSUEING OFFICIAL

23F. TITLE OF ISSUING OFFICIAL

24. IF YOU BELIEVE YOU WERE DISCRIMINATED AGAINST BY THE AGENCY BECAUSE OF EITHER YOUR RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, MARITAL STATUS, POLITICAL AFFILIATION, HANDICAPPING CONDITION, OR AGE, INDICATE SO AND EXPLAIN WHY YOU BELIEVE IT TO BE TRUE. YOU MUST INDICATE EXAMPLES, HOW YOU WERE DISCRIMINATED AGAINST.

See Formal EEO Complaint

25. HAVE YOU FILED A DISCRIMINATION COMPLAINT WITH YOUR AGENCY OR ANY OTHER AGENCY?

❑ NO ☑ YES

25A. IF YES, DATE FILED *(Month, day, year)*

4/4/86

25.B. PLACE FILED *(Agency and location)*

Commanding General
Fleet Marine Force, Pacific
Camp H.M. Smith, Hawaii 96861

25C. HAS THERE BEEN A DECISION?

☑ NO ❑ YES

26. YOU HAVE A RIGHT TO A HEARING ON THIS APPEAL. IF YOU DO NOT WANT A HEARING, THE BOARD WILL MAKE ITS DECISION ON THE BASIS ON THE DOCUMENT YOU AND THE AGENCY SUBMIT. DO YOU WANT A HEARING?

❑ NO ☑ YES

27. YOU HAVE THE RIGHT TO DESIGNATE SOMEONE TO REPRESENTYOU ON THIS APPEAL IF HE/SHE AGREES TO DO SO. THIS PERSON DOES NOT HAVE TO BE AN ATTOURNEY. THE AGENCY HAS A RIGHT TO CHALLENGE YOUR CHOICE OF

A REPRESENTATIVE IF THERE IS A CONFLICT OF INTEREST OR POSITION. YOU MAY CHANGE YOU DESIGNATION OF A REPRESENTATIVE AT A LATER DATE IF YOU SO DESIRE, BUT MUST NOTIFY THE BOARD PROMPTLY OF ANY CHANGE.

27A. "I HEREBY DESIGNATE ____(Will decide later)___ TO SERVE AS MY REPRESENTATIVE DURING THE COURSE OF THE APPEAL. I UNDERSTAND THAT MY REPRESENTATIVE IS AUTHORIZED TO ACT ON MY BEHALF."

27B. YOUR SIGNATURE

27C. DATE

27D. REPRESENTATIVE'S SIGNATURE *(If any)*

27E. DATE

27F. REPRESENTATIVE'S ADDRESS

27G. REPRESENTATIVE'S EMPLOYER

28. YOU MAY BE PERMITTED TO CALL WITNESSES AT A HEARING UPON THE APPROVAL OF THE PRESIDING OFFICIAL. IF YOU INTENT TO DO SO, PROVIDE THEIR NAME AND A BRIEF STATEMENT OF THEIR RELATIOSHIP TO THE CASE. YOU WILL BE PERMITTED TO REQUEST OTHER WITNESSES LATER IF YOU DO NOT LIST THEM NOW.

A.NAME B.RELATIONSHIP TO CASE

PART IV. REDUCTION-IN-FORCE (RIF)

INSTRUCTIONS: FILL OUT THIS PART ONLY IF YOU ARE APPEALING FROM A REDUCTION-IN-FORCE (RIF). YOUR AGENCY'S PERSONNELL OFFICE CAN FURNISH YOU MOST OF THE INFORMATION REQUESTED BELOW.

29. TENURE OF SUB-GROUP

I

30. SERVICE COMPUTATION DATE
11/23/74

31. HAS YOUR AGENCY OFFERED YO ANOTHER POSITION RATHER THAN SEPARATING YOU?
☑ NO ☐ YES

32. TITILE OF OFFERED POSITION

33. GRADE OF POSITION OFFERED

34. SALARY OF POSITION OFFERED

35. LOCATION OF OFFERED POSITION

36. DID YOU ACCEPT THIS POSITION?
☐ NO ☐ YES

37. EXPLAIN WHY YOU BELIEVE YOU SHOULD NOT HAVE BEEN AFFECTED BY THE REDUCTION-IN-FORCE *(Explanations could include: You were placed in the wrong tenure sub-group; an error in the computation of your service computation date; competitive area was too narrow; improperly reached for separation from competitive level; an exception was made to the regular order of selection; full 30-day notice was not given; you believe you can "bump" a person in a lower tenure sub-group; or any other reasons. Please provide as much information as possible regarding each reason.)*

I believe this RIF was engineered and was the culmination of a series of actions which began by personal harassment by my immediate supervisor and ended up as a concerted effort by the management of Camp H.M. Smith to remove me from my position by any means. The formal EEO complaint provides the background to the current action against me.

In addition, I wish to draw your attention to the following facts:

1. I was given two suspension while under RIF notice.

2. I was denied my with-in-grade increase after informing the Executive Officer I would appeal a RIF and therefore I was not eligible for the priority placement program. (My then Attorney Elbridge Smith was told by Mike Long from CCPO, Pearl, that if I did

not challenge the RIF, he would see to it that my performance rating would be "made good" and that the 14 day suspension which he had advised against, would be rescinded and that he probably could do something about reversing the five day suspension.)

3. Although two like positions were abolished, I am the only person being adversely affected. In February 1986 the Executive Officer, LTCol. M.J. Arent told me he had decided abolishing the two Budget Analyst positions under MWR and making it into one under the MASU since last summer (1985). If this is true, I can see no reason for such a long delay in not implementing the RIF sooner, except to pretect a favored employee who would have been adversely affected by the RIF.

4. Camp H. M. Smith is not having a RIF. The Morale, Welfare & Recreation Section was establishing and currently recruiting for a number of positions at the same time I was subject to the RIF.

5. Establishment of the computer supported management infomration system suggests attrition according to the directive from the Commandant of the Marine Corps. Since the combined number of administrative personnel performing under the automated system is more than the Club and Recreaton Programs had individually prior to the consolidation, the use of the RIF procedure is inappropriate.

6. On the CMC table of organization drawn up for Camp H.M. Smith during this consolidation, my position as Custodian of Recreation Fund was transferred to the MASU, but I wasn't. It should also be noted that I was denied any and all training by my supervisors in the computerized system, during the interval that the decision was made to abolish my position in 1985 and the effective date of the RIF.

ATTENTION TO THIS APPEAL MUST BE SIGNED

I CERTIFY that all of the statements made in this Appeal are true, complete, and correct to the best of my knowledge and belief.

s/Barbara Hashimoto
SIGNATURE OF APPELLANT

Appendix S

REQUEST FOR TURNOVER FILE AS A "LETTER OF INSTRUCTION" (FORMERLY HANDWRITTEN)

851201

BARB

Please prepare a turn over file for the appropriated fund fiscal clerk. This has been a discrepancy in Oct 85. Prepare this file as a "Letter of Instruction" from the Special Services Officer to the Budget Assistant. Top Rogers and Joan can give you advise on how to do this. Also we have file copies of old turnover files. Have this completed by 1 Jan 86.

s/Capt. H.

Appendix T

DEPARTMENT OF THE NAVY PERFORMANCE APPRAISAL (BPAP)
ELEMENT NUMBER AND COLUMN A

DEPARTMENT OF THE NAVY PERFORMANCE APPRAISAL
NAVY 12430/9 (11-80) S/N 0104-LF-924-3045

EMPLOYEE NAME *(Last, first, middle initial)*
HASHIMOTO, Barbara M.

OFFICIAL POSITION TITLE
Staff Assistant/Budget Analyst

SERIES
561

GRADE
07

ORGANIZATION TITLE AND CODE
Morale, Welfare and Recreation Section

DUTY STATION AND ADDRESS
Camp H.M. Smith, HI 96861-5010

Element Number	PERFORMANCE ELEMENT *(List perfrmance elements below. Designate critical element by entering "C" in the bracket below element no.)*
[C] (1)	Prepares budget reports and correspondence involving Special Services Nonappropriated Funds
[C] (2)	Administers accounting, reporting and budgeting of Special Services Appropriated Funds
[C] (3)	Analyze Budget Variance and advises Special Services Officer on financial matters that effect NAF and appropriated funds.

[C] (4)	Ensured effective property control procedures are utilized for Special Services, Supply and Plant Property.
[C] (5)	Trains Activity Mangers on Financial Management.

Appendix U

JOB INQUIRY BY CAPT. LOWERY FOR DEPT OF THE NAVY

1. How long have you know this person?
   Ans: Since Nov 84 __3__ years __10__ months

2. In what capacity were you associated with this person?
   ☑ Employer ❑ Supervisor ❑ Co-worker ❑ Friend

3. To your knowledge, is this person reliable, honest, trustworthy, and of good character? ☑ No ❑ Yes
   (*If your answer is "NO," please explain fully:* She is totally unreliable, failed to complete work on time, failed to follow guidence from audit teams resulting loss to fund of app $140,000, is disrespectful to seniors (civilian grades UA-9--UA-11 and mil off Capts.--LtCol.)

(Nos. 3,5,6 & 7 omitted)

10 Aug 88	s/Steven M. Lowery	Major, USMC Camp Smith
Date	(signature)	Occupation or Title

Appendix V

MEMO FROM CAPT. HINMAN STATING PLAINTIFF AWAY FROM WORK FOR 3 WEEKS AND THEN REFERRING TO A 10 FEB DISCUSSION WITH HER THAT WAS WITHIN THE 3 WEEKS

Feb. 18, 1986

BARB

1) As a result of your being away from work for 3 weeks your deadline for conducting the inventory (as instructed in my memo 860115) has been extended to 24 March 1986. Please submit your written report to me by this date.

2) Submit to me in writing explanations of the budget variances from the November financial report that we discussed on 10 Feb. A copy of my notes is enclosed. See Carl for assistance. Complete by 25 Feb.

3) Prepare to conduct a class for all hands concerning the following topics

a) Maintenance & Repair of Facilities
b) Reporting Accidents
c) Personal Property

Enclosed are copies of articles on those subjects. Class will be at 0900 on 28 Feb and last between 45-60 minutes.